LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

NO. ~~1001~~ 149

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOEL W. WESTBROOK, Esq.
306 Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

CHARLES E. WILSON, pro se
(Pending Admission to the Bar
of the Supreme Court of
James Gillespie, Esquire)

SUBJECT INDEX

	Page
Subject Index	i
List of Authorities	iii
Opinions Below	1
Jurisdiction	2
Questions Presented	2– 7
A. Whether or not Petitioners, as employees of EES, were "persons acting for or on behalf of the United States"	2– 3
B. Whether or not incriminating letters from Petitioner Harlow to Petitioner Wilson were erroneously admitted into evidence	3
C. Whether or not Petitioners were sufficiently apprised of the conspiracy charge.	3– 4
D. Whether or not there was fatal variance between the evidence and the proof on the conspiracy count	4– 5
E. Whether or not the substantive counts correctly laid venue in San Antonio Division of the Western District of Texas by alleging commission of the offenses "on the high seas or elsewhere out of the jurisdiction of any particular State or district"	5
F. Whether or not the erroneous admission of hearsay evidence was prejudicial	5– 6

SUBJECT INDEX—Continued

	Page
G. Whether or not the government prejudiced Petitioners' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial	6–7
Constitutional Provisions, Statutes and Federal Rules of Criminal Procedure Involved	8–12
Statement of the Case	12–19
Reasons for Granting the Writ	19–42
Prayer	43
Signature	43
Appendix I	Appendix 1–26

LIST OF AUTHORITIES

	Page
Alcorta v. State of Texas, 355 U. S. 28, 78 S. Ct. 103	30
Aubrey v. U. S., 254 F. 2d 768	20
Blewer v. U. S., 117 Fed. Supp. 509	21
Borden v. U. S., 116 Fed. Supp. 873	20
Canella v. U. S., 157 F. 2d 470	22, 33
Daily v. U. S., 282 F. 2d 818	33
Daniels v. Chanute A.F.B. Exchange, 127 Fed. Supp. 920	21
Edelstein v. South Post Officers' Club, 118 Fed. Supp. 40	21
Faleni v. U. S., 125 Fed. Supp. 630	21
Gouled v. U. S., 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647	24
In Re Krausman, 130 Fed. Supp. 926	34
In Re No. 191 Front Street, Borough of Manhattan, City of New York, 5 F. 2d 282	23
In Re Petition of Provoo, 17 F. R. D. 183 (U. S. D. C. Maryland, 1955)	41
Keane v. U. S., 272 Fed. 577	21, 22
Kotteakos v. U. S., 328 U. S. 750, 66 S. Ct. 1239	30, 33, 40
Pearl v. U. S., 230 F. 2d 243	21
Pulaski Cab v. U. S., 157 Fed. Supp. 955	20, 21
Reimer-Gross Company, et al., v. U. S., 20 F. 2d 36	24, 27, 28
Standard Oil v. Johnson, 316 U. S. 481, 62 S. Ct. 1168	20, 21
U. S. v. Chapman, 14 F. 2d 312	34
U. S. v. Coplon, 185 F. 2d 629, cer. den. 342 U. S. 920	23
U. S. v. Forfari, 268 F. 2d 29	21

LIST OF AUTHORITIES—Continued

	Page
U. S. ex rel Mobley v. Handy, 176 F. 2d 491	34
U. S. v. Holcombe, 277 F. 2d 143 (and see first appeal, 259 F. 2d 505)	21
U. S. v. Krichman, 256 U. S. 363, 41 S. Ct. 514; 65 L. Ed. 992	20, 21, 22
U. S. v. Levine, 129 F. 2d 745	21
U. S. v. Paroutian, 299 F. 2d 486	23
U. S. v. Russano, 257 F. 2d 712	33
Williams v. U. S., 250 F. 2d 19	40
Constitution, United States of America	
Fourth Amendment	8
Sixth Amendment	8, 42
Federal Rules of Criminal Procedure	
Rule 17(c)	11, 42
Rule 41(b)	3, 11
Rule 41(c)	11
Rule 48(b)	12
United States Code	
Title 5, Section 150k	10
Title 18	
Section 202	2, 8, 34
Section 371	2, 9
Section 957	3
Section 3238	9, 33, 34
Title 28, Section 1732	10
28 Op. Attorney General 24 (Wickersham)	35

IN THE

Supreme Court of the United States

October Term, 1961

NO._____

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, James W. Harlow and Charles E. Wilson, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Tuttle, Chief Judge, Rives [Specially Concurring] and Wisdom, Circuit Judges) has not yet been reported (printed, infra, Appendix I).

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1962.

The order denying Petitioners' Motion for Rehearing was entered by the Court of Appeals on April 30, 1962.

Jurisdiction to issue the writ rests on Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

A. Did the Court of Appeals err in its holding that the Petitioners were "persons acting for or on behalf of the United States" (App. I, 14-15)*? The substantive counts of the indictment (under Section 202, Title 18, United States Code), as well as the first count (the conspiracy count, under Section 371 of Title 18, United States Code), depended upon the government's contention that Petitioners, as employees of the European Exchange Service during the approximate periods of January 1, 1950, to September of 1953, in occupied Germany, were either officers and employees of the United States, or were "persons acting for or on behalf of the United States." (R. 2-20) The Court of Appeals acknowledged that there was doubt that Petitioners could be considered as federal employees within the meaning of Section 202, Title 18, United States Code, but held that they were "persons acting for or on behalf of the United States." (App. I, 14-15) Both the Trial Court and the Court of Appeals held adversely as a matter of law to Petitioners' contentions that they were not either federal employees or "persons acting for or on behalf of the United States" in their capacity as European Exchange

*Appendix I, appended hereto, is the opinion below of the Court of Appeals.

Service employees, and furthermore, the Trial Court refused to admit into evidence the contracts of employment Petitioners had with the European Exchange Service, which contracts explicitly stated that Petitioners were "not considered to be . . . federal employee[s]. (R. 1195, 1198, 1203-1204)

B. Did the Court of Appeals err in holding admissible into evidence letters from the Petitioner Harlow to the Petitioner Wilson which, taken together with other evidence, were decidedly incriminating with respect to the conspiracy count and the substantive counts, when

(1) The search warrant issued by the United States District Judge for the High Commission of Germany failed to name the affiants, failed to describe the letters with any particularity at all, and failed to describe the letters as being stolen or embezzled, or as instruments of the crime, or as within the purview of Section 957, Title 18, United States Code, as required by Rule 41(b), F. R. Crim. Pro.

(2) No affidavit was produced at the trial below in support of probable cause.

(3) The secondary evidence of probable cause was admitted without an adequate predicate.

(4) The secondary evidence admitted did not establish probable cause, and consisted of hearsay and conclusions, and did not purport to describe the letters which were seized.

(5) The government originally acquired its knowledge of these letters through illegal interception of the mail.

C. Did the Court of Appeals err in holding that Petitioners were sufficiently apprised of the conspiracy charge against them through the allegations of Count One of the indictment and the government's Bill of Particulars, and in spite of the

Trial Court's failure to enforce his orders to the government to produce certain documents before trial for Petitioners' inspection and copying, and in spite of the Trial Court's denial of Petitioners' motion to inspect the Grand Jury minutes? The conspiracy count alleged in very general terms that the Petitioners and others conspired to cause certain persons and firms and corporations and vendors and agents of vendors to enter into agreements to give the Petitioners a part of their sales commissions and to pay money into numbered bank accounts in Switzerland, and that the Petitioners caused certain persons and firms, and corporations, and agents to believe there was a corrupt group of employees kown as "the organization" that had it in their power to award contracts, and so on, these persons, firms, and so forth, not being specified, with the exception of two persons named McLane and Emborg, the conspiracy count indicating that there were other, unspecified, persons, firms, etc., involved besides these two. (R. 2-9) In its Bill of Particulars the government did not name any other persons besides these two (R. 39-42), but in the evidence presented by the government a number of other persons were named, over Petitioners' objections. (R. 320-340)

D. Did the Court of Appeals err in holding that there was not a fatal variance in the evidence relating to the conspiracy count from the allegations thereof, as against our contention that, while the conspiracy count, as construed by the Trial Court, purportedly alleged only one conspiracy, the evidence admitted over our objections in the Trial Court tended to show at least one other conspiracy, and quite possibly several other conspiracies? Specifically, the conspiracy count charged conspiracy between the Petitioners and a man named Port (deceased at the time of trial) and a defendant named Addy, whose conviction on the conspiracy count (the only

one with which he was charged) was reversed by the Court of Appeals on the grounds of insufficient evidence. The Court of Appeals held that the evidence was insufficient to show that Addy was a participant in the conspiracy charged in the indictment, although the Court of Appeals recognized that there was evidence introduced tending to show that Addy was a member of at least one conspiracy other than that charged. (App. I, 9-11) In connection with this question, Petitioners urged on the Court of Appeals that the Trial Court had committed prejudicial error in not granting our Motion for Mistrial when the government counsel exhibited to the jury a picture of the defendant Addy, in connection with testimony which indicated that it was found in the quarters of the Petitioner Wilson during the search thereof by investigators, although this picture was patently inadmissible and never even offered in evidence. (R. 697-719)

E. Did the Court of Appeals err in holding that the substantive counts correctly laid venue in the San Antonio Division of the Western District of Texas under Section 3238, Title 18, United States Code, by alleging the commission of the offenses "on the high seas or elsewhere out of the jurisdiction of any particular State or district?" In Petitioners' motion to dismiss the substantive counts, it was contended that these offenses, if any, were committed within the jurisdiction of the United States Court for the High Commission of Germany, and it was further contended that in substantive counts five through nine, there was no allegation as to where the offense did occur. (R. 1312)

F. Did the Court of Appeals err in holding as not prejudicial, on the basis that other evidence overwhelmingly established the guilt of the Petitioners, the erroneous admission of hearsay evidence (App. I, 25), the same including:

(1) Testimony by the prosecuting witness McLane, agent of a vendor dealing with the European Exchange Service, as to the contents of memoranda prepared by European financial institutions and purportedly reflecting transfers of money in favor of an account number purportedly designated by the Petitioner Harlow. (R. 153-154, 231-239)

(2) A letter purportedly written by the prosecution witness McLane in London to the Petitioner Harlow in San Antonio, Texas. (R. 174-175, 179-182)

(3) A letter purportedly sent by the prosecuting witness Emborg, agent of a vendor to the European Exchange Service, to the American Express Company, requesting transfer of funds to a Swiss bank for two numbered accounts. (R. 1046-1048)

(4) A letter from the prosecuting witness Emborg to the Petitioner Harlow respecting a purchase order and the expected transfer of a large sum of money "in the usual way." (R. 1048-1056)

(5) "Confirmations" from financial institutions purportedly received by the prosecuting witness Emborg through the mail reflecting transfers to Swiss banks in favor of numbered accounts. (R. 1027-1045)

(6) A ledger sheet purportedly prepared by the secretary of the prosecuting witness Emborg and purportedly itemizing bribes paid to accounts designated by the Petitioner Harlow. (R. 1065-1078)

G. Did the Court of Appeals err in holding that the government had not prejudiced the Petitioners' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial? The indictment alleged criminal conduct on the part of Petitioners and others generally over the period Jan-

uary 1, 1950 to about January 1, 1954, with actually there being no evidence introduced of any criminal conduct later than September, 1953. The indictment was not returned until April 19, 1957, and the case was not called for trial until June 6, 1960. There was no delay interposed by Petitioners, nor did the government claim such. Petitioners did not file any motion, it is true, seeking an earlier trial. There was no contest of Petitioners' contention that many of those connected with the European Exchange System, having valuable and relevant information, had moved to other parts of the world, or that the alleged co-conspirator Port, who supervised the drawing of all the food contracts between the Exchange System and vendors, and who had full knowledge of the purchasing procedures of the European Exchange Service, died on May 15, 1959, more than a year prior to the date of trial. There was testimony offered by the government respecting the deceased co-conspirator Port's participation in the criminal conduct, and there were admissions by the prosecuting witness McLane on cross-examination that he had signed certain documents reflecting that he (McLane) was the true owner of a numbered Swiss bank account carried in the co-conspirator Port's name, that he had received from that account all the funds deposited therein, and there was no explanation made by the prosecuting witness McLane on cross-examination or on re-direct of this rather unusual circumstance. (R. 283-287) Furthermore, the prosecuting witness McLane admitted that he had a contract with a man named Lamb to share all the commissions received in European Exchange Service transactions, and that he had not shared these commissions with Lamb. (R. 277-279)

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

A. There is involved the **Fourth Amendment to the Constitution of the United States**, the same reading as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. There is also involved the **Sixth Amendment to the Constitution of the United States**, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

C. The principal criminal statute involved is **§202 of Title 18, U. S. Code**, reading as follows:

> **"Acceptance or solicitation by officer or other person.** Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any

money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States."

D. Also involved is §371 of Title 18, U. S. Code, reading as follows:

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

E. Also involved is §3238 of Title 18, U. S. Code, reading as follows:

"Offenses not committed in any district. The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

F. Also involved is §1732 of Title 28, U. S. Code, reading as follows:

> "**Record made in regular course of business.** In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

G. Also involved is §150k of Title 5, U. S. Code, reading as follows:

> "**Civilian employees not subject to laws administered by Civil Service Commission.** Civilian employees, compensated from nonappropriated funds, of the Army, and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for

the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: Provided, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, §1, 66 Stat. 138."

H. Also involved are the following **Federal Rules of Criminal Procedure:**

17 (c) **Subpoena. For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

41 (b) **Search and Seizure. Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

41 (c) **Search and Seizure. Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the

grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

48(b) **Dismissal By Court.** If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT OF THE CASE

Petitioners, together with Thomas Addy, were convicted on June 16, 1960 (Honorable W. R. Wallace, United States Judge for the Western District of Oklahoma, Assigned, deceased between conviction and sentence) and sentenced on February 14, 1961 (Honorable Ben H. Rice, Jr., Judge) in the United States District Court for the Western District of Texas, San Antonio Division, under an indictment charging

the first count a conspiracy between the Petitioners, Thomas Addy (whose conviction was reversed by the Court of Appeals), and one Paul Port (deceased at the time of trial), as well as others unnamed, as European Exchange Service employees and in such capacities purportedly as United States government employees, or as persons acting for or on behalf of the United States, to defraud the United States with respect to the honest administration of the affairs of the European Exchange System, averring that this conspiracy was substantially accomplished by the solicitation of bribes from vendors and agents of vendors to the European Exchange System. The indictment also alleged in counts two and three the solicitation of bribes on the part of Petitioner Wilson of the prosecuting witness McLane, and in counts four through nine the receipt by Petitioner Harlow of bribes from the prosecuting witness McLane and the prosecuting witness Emborg.

The period of time allegedly covered by the conspiracy charged in the First Count of the indictment was from about January 1, 1950 to about January 1, 1954, and the places where this conspiracy occurred were alleged to be Nurnberg, Germany; Zurich, Switzerland; Amsterdam, Holland; London, England, Paris, France; San Antonio, Texas; and "other places more particularly to the Grand Jury unknown." (R. 3)

Substantive counts two and three (Wilson) alleged that the offenses were committed at points "out of the jurisdiction of any State or district in the United States," and all substantive counts alleged that, subsequent to the commission of these acts, Petitioners Wilson and Harlow each returned to the United States and resided in San Antonio, Texas, and were each found in the Western District of Texas on the date of the return of the indictment.

Petitioners filed motions to suppress evidence, the same

being documents taken from the living quarters of the Petitioner Wilson in Nurnberg, Germany, in 1953. (R. 98, 1321)

Before the introduction of evidence began in the trial, the Court granted the motion (R. 126). Then the Court reconsidered this action and heard extensive testimony and argument in chambers.

To meet Petitioners' objection that there was no affidavit in support of the search warrant, the Government then undertook to produce testimony of the former United States Judge for the Court of the Allied High Commission of Germany, Judge Turmo, who issued the warrant. The Government sought to establish by him the contents of the affidavit, to which we objected on the grounds that there was insufficient predicate for this secondary evidence, there not being a satisfactory accounting for the absence of the affidavit, and we also objected to much of the testimony on the grounds that it constituted conclusions of the witness.

Similarly we objected to the testimony of the District Attorney and of the investigators with respect to the contents of the affidavit. The Court then permitted the introduction into evidence of the documents seized during this search of the Petitioner Wilson's quarters. (R. 536-570, 594-612, 652-653, 690-699, Ex. 22-28)

Then it developed, during cross-examination of the key government witness McLane, that McLane, in May of 1953, **prior** to the search of Wilson's quarters in September of 1953, had been shown by the government investigators a copy of government Exhibit 22, one of the letters seized in the Wilson quarters search. He testified he was told by the government investigators of the contents of other such letters that the government investigators had intercepted. He testi-

fied that he undertook to get Emborg also to cooperate with the government in this case. (R. 847-848, 854-857)

This development in McLane's cross-examination occurred on the afternoon of June 13, 1960, a week after the trial had begun.

Following the recess on that day, there occurred extensive testimony in chambers (R. 875-908), which continued the next day. (R. 909-1014)

The Court indicated he was satisfied that the letters had been illegally intercepted, and that these illegally intercepted letters were the basis for the investigators being able to break McLane down, that the record failed to show that an affidavit in support of the search warrant was ever filed, and that the Fourth Amendment had been violated. (R. 988-989, 994-995)

The Court indicated he would declare a mistrial because it was impossible to cure the prejudice resulting from the letters having been admitted into evidence. (R. 988, 1000-1002) The following morning, June 15, 1960, however, the trial court concluded that the evidence was admissible and did not declare the mistrial. (R. 1015-1016)

One of the exhibits seized in the search of Petitioner Wilson's quarters was a folder belonging to Thomas Addy, containing personal papers of Addy, none relating to the alleged conspiracy, and a large photograph of Addy. This exhibit was not made available to the Petitioners, although encompassed in the Court's order prior to trial and it was not introduced into evidence, but Petitioners moved for a mistrial on the grounds that government's counsel under very dramatic circumstances had exhibited the file folder with Addy's picture to the jury. The Trial Court overruled the motion on the

grounds that this did not constitute prejudice. (R. 699-719, Ex. 29).

During McLane's testimony, over our objections he was permitted to testify from documents he said had been prepared by the Credit Swiss Bank and Popularis Tours, giving dates and amounts of money he claimed were transferred from his Popularis Tours Account to account number 198427, a number he had testified Petitioner Harlow designated. The documents themselves (Ex. 7 and 7A) were never accepted in evidence. (R. 227-240)

A letter purportedly written by McLane in London to Petitioner Harlow in San Antonio was identified as such by McLane and introduced into evidence as against Petitioner Harlow over our objections that the same was hearsay, and that there had not been a proper predicate laid for its introduction. (R. 173-181)

Henrik Emborg testified that Petitioner Harlow had suggested to him that he make payments into a designated numbered bank account in Switzerland for the purpose of improving his business relations with the European Exchange Service. (R. 1021-1023)

During his testimony, the government had Emborg identify what purported to be a ledger sheet containing an itemization by date and amount of moneys deposited to the accounts allegedly designated by Harlow. This sheet was admitted into evidence over our objection that it was hearsay, and that a proper predicate had not been laid to establish a "Shop Book Rule" exception. (R. 1065-1078)

During Emborg's testimony the government had him identify some American Express Co. "confirmations" (Ex. 32-42), purportedly received by him through the mail, and reflecting

that American Express had transferred various sums of money to Credit Suisse and Union Bank (of Switzerland) in favor of three different numbered accounts therein on behalf of Filbert, Ltd., purportedly represented by Emborg. The Trial Court overruled (R. 1031, 1041) our objection on the grounds of hearsay (R. 1029), lack of predicate for The Shop Book Rule (R. 1028), and surprise because of non-compliance with the Court's order to produce documents before trial. (R. 1033-1040)

Then, over our objection that it was hearsay, and no Shop Book Rule exception predicate laid, the Court admitted into evidence a letter from Filbert, Ltd., purportedly mailed by Emborg, to American Express, requesting the transfer of some funds to the Union Bank for two numbered accounts. (Ex. 43, R. 1046-1048)

Then, the Court admitted into evidence Ex. 44, purportedly a copy of a letter from Emborg to Harlow, dated May 26, 1953 (several months after Harlow left EES—R. 1057) at the Southern Marketing Co., 4 Old Burlington St., London, England, correcting some figures on a purchase order, calculating therefrom the sum of $5686.41, which the letter states will be transferred "in the usual way," our objection being that the same was hearsay, and of surprise because of failure of the government to comply with the order to produce documents before trial. In addition, we moved for a mistrial. (R. 1048-1057)

The government introduced through former EES investigators Stewart and Bray evidence of what we called the "Black Forest" case. (R. 1153)

Substantially Stewart testified that he and Bray had a conversation in July, 1952 with their immediate superior, Addy, then Chief of Security for EES (R. 314). This conversation,

according to Stewart concerned principally 400 day clocks, which were a "hot item within the PXs." Stewart was of the opinion that in the Black Forest "we could find clock makers" to supply these clocks, and "the point came up, maybe we could make a little bit of money in it" and that "Mr. Addy agreed to this." (R. 320-321)

Stewart testified that attempted contacts with a man named Preetz (with reference to reinstating with EES a firm—Hertzog—selling barber shop units), and a man named Eiler producing nothing (R. 324-325), he had a further conversation with Addy, who said that, if Stewart could arrange to secure a certain amount of money from the Hertzog firm, he (Addy) would arrange with one Friedman, to have the firm taken from the blacklist and resume business with EES (R. 325).

Stewart testified that Addy, Bray and he received "kickbacks" from Eiler, not only from the Hertzog firm, but from other vendors, naming Rath-Geschwinn (R. 325-327, 329). The court overruled our objections that this testimony consisted of conclusions, was irrelevant, and involved persons and firms not named in the indictment or Bill of Particulars. (R. 325-327, 329-340)

Further, Stewart testified that in September of 1952 Addy gave Stewart and Bray blank forms from a Swiss bank, telling them to fill them out, and that he (Addy) would arrange for certain monthly sums to be deposited to the numbered bank accounts created thereby, thus enabling Bray and Stewart to stay away from the firms (R. 333), the bank purportedly being Bank Fur Anlagewerte (R. 339).

Stewart then testified about his participation in the investigation of McLane in July of 1953 (R. 343-348).

McLane testified that Wilson, in an Amsterdam, Holland,

Park Hotel conversation, told him Addy was "being taken care of by the organization." (R. 202)

Emborg testified that he met Addy "on a few occasions" (R. 1019), and recognized him in the courtroom. (R. 1065)

The Trial Court excluded our offer of evidence reflecting that the contracts of employment between Petitioners and European Exchange Service specified that Petitioners were not government employees. (Ex. W-z, R. 1195, 1198, 1203-1204, Addy Ex. E, C, D, B, R. 1209, 1211) The Trial Court also excluded our offer of the European Exchange Service purchase contracts let during the period for the purpose of establishing that Petitioners did not in fact award these contracts, and furthermore, that an analysis of them would negative the idea any favoritism was shown to Emborg and McLane. (R. 1199-1206)

The Court of Appeals affirmed the conviction of the Appellant Harlow on all counts (conspiracy Count One, and substantive Counts Four through Nine) and the conviction of Petitioner Wilson on substantive Counts Two and Three, and reversed the conviction of the Appellant Addy on Count One (App. I, 25). The Court reversed the conviction of Petitioner Wilson of the conspiracy charge on the grounds of double jeopardy, Petitioner Wilson having been convicted in March, 1954, before the United States Court of the Allied High Commission of Germany of the same offense (App. I, 21-25).

REASONS FOR GRANTING THE WRIT

A. With reference to the question as to whether or not the Fifth Circuit erred in its holding that Petitioners were "persons acting for or on behalf of the United States":

(1) This holding of the Fifth Circuit is in conflict, in our

opinion, with the holding of the United States Supreme Court in *U. S. v. Kirchman*, 256 U. S. 363, 41 S. Ct. 514, 65 L. Ed. 992, where the Supreme Court reversed the bribery conviction of a railway porter employed in wartime when the railroads were under the control of, and operated by, the federal government.

(2) This holding by the Fifth Circuit undertakes to decide an important federal question which has not been precisely settled by this Court, but which should be. Although this Court in *Standard Oil v. Johnson*, 316 U. S. 481, 62 S. Ct. 1168, held the Post Exchange to be "an integral part" of the War Department, so as to be immune from State taxation, at least under certain circumstances (page 485 of 316 U. S.), the question of the status of the employees was in nowise involved in that case. Our belief that the *Standard Oil* case does not answer the question resolved by the Fifth Circuit in the instant case is substantially reinforced, we believe, by two opinions of Mr. Justice Reed, following his retirement from the United States Supreme Court: One was a Court of Claims opinion, *Pulaski Cab v. United States*, 157 Fed. Supp. 955, and the other was a decision of the United States Court of Appeals, District of Columbia, in *Aubrey v. United States*, 254 F. 2d 768. In the *Pulaski* case Mr. Justice Reed relied in his opinion heavily upon *Borden v. United States*, a Court of Claims decision in 116 Fed. Supp. 873, where the Court pointed out that Post Exchange contracts were solely the obligation of the Exchange and were not government contracts, discussing the *Standard Oil v. Johnson* opinion in the course of doing so. In the *Aubrey* case Mr. Justice Reed discussed *Standard Oil v. Johnson*, indicating that this case has raised "certain doubts concerning the status of civilian employees of nonappropriated fund activities under the jurisdiction of the Armed Forces" (page 770 of 254 F. 2d). It

might also be pointed out that this question should be resolved by our highest court because the government itself has been quite ambivalent in the position it has taken in litigation with respect to the governmental status of nonappropriated funds activities, and the status of their employees, asserting the governmental status in the following cases, for example: *U. S. v. Forfari*, 268 F. 2d 29; *U. S. v. Levine*, 129 F. 2d 745; *Standard Oil v. Johnson*, 316 U. S. 481; *Keane v. U. S.*, 272 Fed. 577; *Krichman v. U. S.*, 256 U. S. 363; *Faleni v. U. S.*, 125 Fed. Supp. 630. Then in the following cases the government denied, to some extent at least, the governmental status of the activity, and/or its employees: *Daniels v. Chanute A.F.B. Exchange*, 127 Fed. Supp. 920; *U. S. v. Holcombe*, 277 F. 2d 143 (and see first appeal, 259 F. 2d 505); *Pearl v. U. S.*, 230 F. 2d 243; *Pulaski v. U. S.*, 157 Fed. Supp. 955; *Borden v. U. S.*, 116 Fed. Supp. 873; *Aubrey v. U. S.*, 254 F. 2d 768; *Blewer v. U. S.*, 117 Fed. Supp. 509; *Edelstein v. South Post Officers' Club*, 118 Fed. Supp. 40.

(3) This Fifth Circuit holding is in conflict with that of the Fourth Circuit in 1921 in *Keane v. U. S.*, 272 Fed. 577, where that Circuit reversed a conviction for conspiracy to defraud the United States by the defendant, a salesman, and a soldier named Brown, who was a detailed employee of a Post Exchange; it being charged that the defendant and Brown conspired to increase prices and to pad invoices on accounts at the Post Exchange. The direct question which was resolved in favor of the defendant in that case was "whether or not the Post Exchange mentioned in the indictment is such an institution as that a fraud upon the United States can arise from or be involved in any transaction concerning it." (Page 579) The Fourth Circuit stated that the highly penal statute involved could not apply "to any lawful department, so that a fraud upon the United States can arise from or be involved

in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public monies to maintain and operate it." (Page 587) The Court of Appeals relied upon a Ninth Circuit holding, *Canella v. U. S.*, 157 F. 2d 470, which in our view can not only be distinguished, but is not nearly so consistent with the Supreme Court holding in *U. S. v. Krichman*, 256 U. S. 363, as is the Fourth Circuit's holding in the *Keane* case.

B. With reference to the letters seized in Petitioner Wilson's quarters, and our contentions that the letters were not the proper subject of the search warrant, that they were not described with particularity in the search warrant, and that there was an inadequate showing of probable cause (especially in view of the absence of the affidavit in alleged support of probable cause to issue the warrant), and our further contention that the letters could not be legally seized under a search warrant because the information relating thereto had come to the government through an illegal interception of the Petitioner Wilson's mail:

(1) The Fifth Circuit held in the instant case that the burden was on Petitioners to establish that the seizure under search warrant of the letters from Petitioner Wilson's quarters was the product of information gained from the illegal interception of these letters. (App. I, 20-21) The Fifth Circuit's opinion discusses evidence offered by the government in support of its contention that the search and seizure was the result of an origin "wholly independent of the unlawful interception;" however, it is quite evident that none of the information allegedly proceeding from the "wholly independent" lead suggested that there was any incriminating corre-

spondence between the Petitioner Harlow and the Petitioner Wilson, much less describing the same. The Fifth Circuit's holding in this particular, we believe, is in conflict with the holding of the Second Circuit in *U. S. v. Coplon*, 185 F. 2d 629, cer. den. 342 U. S. 920, which held that, although the defendant in the Trial Court had the burden of proving that there had been illegal wire tapping, once this had been established, the government then had the burden of proving that its evidence did not illegally proceed therefrom. Moreover, the Fifth Circuit's holding in this regard in the instant case is in conflict also with the Second Circuit in its recent decision (February 9, 1962) in *United States v. Paroutian*, 299 F. 2d 486, which held that the government had the burden of showing as a matter of fact, not as a "possibility," that independent information, and not previous unlawful searches, led to the discovery of incriminating evidence on a later occasion when they were conducting a search with the consent of the apartment house owner.

(2) The Fifth Circuit, *sub silentio*, held that it was not necessary for the warrant to describe the letters which were seized, and this holding is in conflict with that of the Second Circuit in *In Re No. 191 Front Street, Borough of Manhattan, City of New York*, 5 F. 2d 282. The search warrant in that case directed the officers to seize certain intoxicating liquors and records. The Trial Court in this case held against the defendant's contentions that the records should be returned for the reason, inter alia, that the affidavit in support of the warrant did not name the records desired. The Second Circuit reversed, and quotes the very general language of the affidavit referring to "any papers, books, records or documents pertaining to the sale, possession, or transportation of intoxicating liquors" and concludes that "This allegation does not warrant the seizure of papers nor could any testimony before

the Commissioner supply what is here missing." (Page 285 of 5 F. 2d)

(3) The Fifth Circuit's holding, *sub silentio*, that these letters, which we contend were "evidentiary" only in their character, could be the proper subject of seizure under a search warrant, is in conflict with the decision of the United States Supreme Court in *Gouled v. U. S.*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. In reversing on the basis of evidence illegally obtained, part of which were secured under a search warrant, the Court pointed out that not all property by any means could be the subject of a search warrant, and that such searches could be "resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken." (Page 309 of 255 U. S.)

C. With reference to the question presented by Petitioners' contention that they were prejudicially denied adequate advice as to the charges against them in the conspiracy count (One), coupled with the inadequate information in the government's Bill of Particulars and the misleading character thereof, and the Trial Court's failure to enforce his orders to the government to produce certain documents before trial for Petitioners' inspection and copying, and the Trial Court's denial of Petitioners' motion to inspect the Grand Jury minutes: the Fifth Circuit's holding in the instant case that the conspiracy count, together with the Bill of Particulars, adequately informed the Petitioners of the charges against them so that they were not seriously prejudiced is in conflict with the holding of the Sixth Circuit in *Reimer-Gross Company*,

et al. v. U. S., 20 F. 2d 36. One needs only to read the first four pages of the indictment, which purports to charge a conspiracy, to realize that the Petitioners had an extremely difficult, if not impossible, task to prepare an adequate defense to these vague and general accusations. On pages 3 and 4 of the indictment, for example, in paragraphs 6 through 10, and paragraph 12, the government was alleging in various ways that the Petitioners conspired to cause persons and firms, and corporations, and vendors, and agents of vendors, to enter into agreements to give Petitioners a part of their sales commissions, and to pay money into numbered bank accounts in Switzerland, and that Petitioners caused persons, firms, corporations, agents, etc., to believe there was a corrupt group of employees, known as "the organization" that had it in their power to award contracts, etc., and so on and on—with these persons, firms, etc., not being specified, not being named, not being defined. (R. 2-5) In its Bill of Particulars (R. 39), the government did not undertake to be more specific in identifying these persons and firms although we repeated our complaint through the office of our Motion for Bill of Particulars (R. 13-14), which was also overruled (R. 44-45).

We were faced, therefore, with the problem that the government might produce at the trial some of these unspecified persons and firms.

By reason of the vague and indefinite character of the allegations, the Petitioners had no real basis (even aside from the time and space problems involved) for investigation of these accusations, which substantially were alleged offenses occurring on the continent of Europe (with most of the activity apparently taking place some eight or nine years prior to the date of trial), so that the credibility of the testimony in these unspecified respects could be explored, and so that

Petitioners could accumulate information about the various contracts allegedly involved, which contracts were not specified. And, because the goods, wares and merchandise allegedly involved were not sufficiently identified so that Petitioners could have an opportunity of showing that it was highly unlikely that these unidentified persons and firms could believe that the Petitioners were in a position to influence awarding of these contracts in the capacities in which the Petitioners were then engaged, which capacities were not alleged.

That this particular aspect of the problem was not a fictitious one, was very well illustrated by the fact that the government did introduce evidence about persons and firms not alleged in the indictment. Over our objections, the government had the witnesses Stewart and Bray testify about arrangements that they made with the Appellant Addy to solicit bribes from persons who were not named in the indictment or Bill of Particulars, with respect to goods and merchandise not specified in the indictment or the Bill of Particulars. (R. 320-340)

Additionally, although the indictment vaguely alleged Petitioners conspired with "other persons to the Grand Jury unknown," government witnesses testified about a number of "conspirators."

McLane, for example, identified as members of the "organization": Mr. Friedman (R. 160, 292), Mr. Sockolow (R. 287-288), Col. Fredericks (R. 287-288), Mr. Richard (R. 282, 287), Col. Kendall (R. 282-283), Mr. Ross (R. 283), Mr. Swartz (R. 283-288) and Messrs. Bretts, Bosier, Wilkie, and Withwarsh (R. 287).

Stewart and Bray's testimony certainly could support the conclusion that they were conspirators with Appellant Addy in the "Black Forest" transactions. And Stewart also indi-

cated Friedman was a conspirator with Addy on the "Black Forest" transaction involving purported plans to remove a barber shop unit supplier from the EES black list (R. 325).

Reimer-Gross Co., et al. v. United States, 20 F. 2d 36 (Sixth Circuit, 1927) was a case where a conviction for concealing property of a bankrupt from the trustee was reversed on the insufficiency of the evidence, yet with the court definitely stating its opinion that the indictment was insufficient by reason of being too vague and indefinite. The allegation under attack in that case was that the defendant concealed "certain goods, wares, merchandise, money credits, and other things of value in the amount of $10,000.00 or more, a further and more particular description thereof being to the grand jurors unknown." The Court of Appeals stated that "every term used—i.e., goods, wares, merchandise, money credits, and other things of value—is general. The first three would include everything kept in a store or subject to any kind of mercantile trade. 'Money credits' is even more indefinite and general, and 'other things of value' is so indescribably broad as to be practically all-embracing. None of them signifies anything specific, or susceptible of the limited class identification." (Page 37) The Court goes on to say, on page 38, that an indictment may be indefinite either in the "character of the acts charged" or "the identifying circumstances."

We think it is evident that the indictment in the instant case is even more indefinite, and it is interesting to note that substantially the same language as condemned in the *Reimer-Gross* case is used in several paragraphs of Count One of the instant indictment. We believe the conflict of the Fifth Circuit's holding in the instant case with that of the Sixth Circuit in the *Reimer-Gross* case is emphasized by the Fifth Circuit's sustaining of the Trial Court's denial of our Motions

for Bill of Particulars and to inspect the Grand Jury minutes, and by the Trial Court's failure to enforce his order for pre-trial production of documents.

The Trial Court, in a letter order granting one of our motions to produce documents prior to trial observed: ". . . in view of the nature of this prosecution and the peculiar problems created by the varied geographic locations of the witnesses herein, it seems essential that the defendant Harlow be permitted to see, and copy if so desired, the documents taken from these other two alleged participants in order to avoid the element of unfair surprise at the time of trial." (R. 58) (Emphasis supplied)

We believe that an examination of our motion for Bill of Particulars (R. 1314-18) will show that we were not asking for the government's evidence, but for no more than reasonable "identifying circumstances" (*Reimer-Gross Co., et al., v. U. S.*, 20 F. 2d 36 [6 Cir., 1927]).

While the government's Bill at first reading might appear to supply impressive documentation, and truly "adequate compliance," furnishing us with "all critical information" (Trial Court's order denying motion—R. 44-45), a closer analysis will reveal that the government, while furnishing in its Bill certain details of evidence, withheld from us really vital "identifying circumstances."

Probably the most significant information withheld from us by the government were: 1. The names of the "other persons to the Grand Jury unknown" with whom Petitioners allegedly conspired, 2. Names of the "other persons, firms, and corporations . . . [and] organizations . . ." [i.e., other than McLane and Emborg and their firms] whom Petitioners allegedly were soliciting for bribes, and split commissions,

upon representations that they would be thereby awarded contracts with EES, 3. Names of the "corrupt group of employees within EES known as and commonly referred to as the 'organization,'" and 4. Names of the "vendors, or agents of vendors, who were supplying foodstuffs and other merchandise to the said EES" who were allegedly caused by Petitioners "to pay money into numbered bank accounts for the benefit of defendants," and 5. The bank accounts involved—all of which was specifically requested by us. (R. 1314-16)

With respect to each category the government not only withheld information known to them, but introduced over our objections damaging evidence respecting each category.

Indeed with respect to two categories—the vendors, or agents of vendors, allegedly caused by Petitioners to pay money into numbered bank accounts—and the bank accounts involved—the government did more than withhold; the government affirmatively misled Petitioners. In apparent response to paragraph 10 of our Motion for Bill of Particulars (R. 1315), the government in paragraphs one and two of its Bill of Particulars named only McLane and Emborg, and named only account number 751 in the Bank fur Anlagewerte, (R. 39-40) identified by Emborg as an account to which he was directed by Harlow to make payments. (R. 1033) Yet, during the course of the trial the government introduced evidence tending to indicate that vendors other than McLane and Emborg, or firms represented by them, paid money into accounts numbered 937 and 938 (for government witnesses Bray and Stewart respectively, in connection with an alleged agreement with Addy to solicit bribes from vendors—R.336 and see R. 320-322) and 939 (R. 338) for Addy, all in Bank fur Anlage-

werte (R. 339) as developed in testimony of the government witness Stewart.*.

It is difficult to see how the government in this act of misleading through the office of the Bill of Particulars is in any better light than was the State of Texas in *Alcorta v. State of Texas*, 355 U. S. 28, 78 S. Ct. 103 (1957), where a murder conviction was set aside where the prosecutor knowingly allowed false impressions of its key witness to stand uncorrected.

D. The Fifth Circuit's holding that any variance between the proof, showing two conspiracies, and the indictment, which charged only one conspiracy, could not affect Petitioners' substantial rights (App. I, 11) is in conflict with the United States Supreme Court decision of *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239. There were three signicant variances: First, in that the government proof tended to establish more than one separate and distinct conspiracy, as against, presumably, an allegation of one general conspiracy (Note: our contention that the conspiracy count was duplicitous—R. 1311—was overruled—R. 44). Second, that the indictment alleged a conspiracy among Petitioners and "other persons to the Grand Jury unknown" (R. 3), whereas the proof showed that the Grand Jury in all probability knew about the "other persons" (Stewart and Bray) about whom there was testimony reflecting a conspiracy with Appellant Addy. Third, that the indictment alleged that the Petitioner-conspirators solicited bribes from, and otherwise dealt corruptly with unspecified other persons, firms, corporations,

*His appearance before the Grand Jury seems established by the government's implied admission of this fact in its answer to our Motion to Inspect the Grand Jury Minutes (R. 70-75)—paragraph 8 of government's Answer (R. 89). Accordingly it would seem evident the government knew of this information.

organizations, vendors, and agents of vendors, besides McLane and Emborg, and the firms represented by them, whereas the government proof tended to establish solicitation of bribes and other corrupt dealings with specified persons and firms other than McLane and Emborg and their firms.

The indictment in Count One—the conspiracy count—undertook to allege a conspiracy between the Petitioners, one Paul Port (deceased at the time of trial) and "other persons to the Grand Jury unknown" to defraud the government by soliciting and receiving bribes from Robert T. McLane, Henrik Emborg "and other persons" engaged in the selling of merchandise to the European Exchange Service and by arranging to split the sales commissions of such persons with the Petitioners, and by related activities. (R. 2-5)

In our Motion for a Bill of Particulars, we asked that these "other persons to the Grand Jury unknown" and these "other persons" be identified (R. 1314-15) but the government did not identify them in the Bill of Particulars which it filed (R. 39), and the Court denied our Motion (R. 44-45).

During the course of the trial the government introduced evidence tending to establish a conspiracy between Harlow and Wilson to solicit and receive bribes from McLane and from Emborg.

There was no evidence whatsoever connecting Addy with this conspiracy, aside from McLane's testimony that Harlow and Wilson had made statements to him (McLane) reflecting that Addy was being paid by the "organization" (R. 163, 202).

The government witness Stewart testified that in July, 1952, and thereafter, he and government witness Bray, as EES investigators, agreed with Addy respecting the solicitation of funds from vendors of clocks in the Black Forest, and

also for Stewart and Bray to contact a German named Preetz for the purpose of making the arrangements for solicitation of bribes from some barber shop vendors, including a man named Eiler. The name of the barber shop firm was Hertzog; they had been blacklisted, and were to pay money to be taken off the blacklist. Additionally involved supposedly was a man named Friedman, in charge of purchasing barber shop units, and other vendors, for example, one called Rath-Geschwinn (R. 320-340).

There was no evidence of any character showing any connection whatsoever of Harlow, Wilson, Port, or McLane or Emborg, with any of these "Black Forest" transactions. Nor were Stewart or Bray, nor any of the vendors in the "Black Forest" transactions shown to be connected with the Harlow-Wilson "conspiracy."

We objected, bringing out that we had been denied the information asked for in our Bill of Particulars respecting the "other persons" and further that the firms mentioned by the government in their Bill of Particulars did not include the firms covered in this line of testimony. (R. 327, 322)

In our motions for acquittal, we raised the point of variance.* Under the government's evidence we had at least two separate and distinct conspiracies suggested. It might fairly be argued that there were several conspiracies embodied in the general Harlow-Wilson area, and several conspiracies involved in the Addy-Stewart-Bray area. Be that as it may, there were certainly two separate distinct general conspiracies involved in the government's proof.

Kotteakos v. United States (June 10, 1946), 328 U. S. 750, 66 S. Ct. 1239, is the leading case involving this point of the

*Harlow motion at end of government case on page 1150, 1152, 1054, 1157; Addy, 1157-1158; Wilson 1158-1159; and at close of whole case Harlow-1241, and Addy and Wilson-1158-1159.

fatal variance in proof where there is proof of multiple conspiracies and allegation of a single conspiracy.

In the *Kotteakos* case, the evidence showed that there was one defendant who was common to all of the conspiracies indicated by the proof, whereas in our case, there is no single individual who is connected up with both the Harlow-Wilson conspiracy and the Black Forest conspiracy.

The United States Supreme Court reversed the conviction holding that the error was not harmless, and specifically pointing out "the dangers for transferance of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." (Page 774 of 328 U. S.)

In addition, the holding of the Fifth Circuit here that the variance was nonprejudicial (keeping in mind that the Fifth Circuit specifically found that "the indictment and bill of particulars failed to disclose even the haziest outlines of a conspiracy between Addy, Stewart and Bray to solicit and receive bribes from vendors other than McLane and Emborg . . ." (App. I, 10-11)) is in conflict with the Ninth Circuit decision in *Daily v. U. S.*, 282 F. 2d 818, the Second Circuit decision in *U. S. v. Russano*, 257 F. 2d 712, and the Ninth Circuit opinion in *Canella v. U. S.*, 157 F. 2d 470.

E. In holding that the substantive counts of the indictment properly laid venue in the Western District of Texas under Section 3238 of Title 18, United States Code, the Fifth Circuit decided an important question of federal law which has not been, but which should be, decided by the United States Supreme Court. Section 3238 reads as follows:

> "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of

> any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

All of the substantive counts depended upon the application of Section 3238 for venue in the Western District of Texas. Petitioner Harlow moved to dismiss substantive counts Four through Nine (charging Petitioner Harlow with receiving bribes from McLane and Emborg) on the grounds of lack of jurisdiction because it appeared from the indictment that these offenses, if any, were not committed within the Western District of Texas, but within the jurisdiction of the United States Court for the High Commission of Germany (R. 1312), which motion was denied (R. 44-45). The Fifth Circuit stated that there was "scant precedent" in this situation, and felt that the issue was whether or not the German occupied territory under the jurisdiction of the High Commission Court was a "district" within the meaning of Section 3238, the Fifth Circuit concluding that it was not. The Fifth Circuit went on to say that the High Commission Court did not have jurisdiction to try Petitioners for violating Section 202 of Title 18, United States Code. (App. I, 13) Yet the Fifth Circuit found double jeopardy in Petitioner Wilson's prior conviction of the conspiracy count, which substantially alleged a scheme to violate Section 202 of Title 18, United States Code, by the same High Commission Court (App. I, 21-25). We believe that the Fifth Circuit did not give sufficient consideration to the decision which supports the proposition that the Petitioner Harlow could have been tried by the High Commission Court, even if he had been in the United States at the time of the filing of the charges, because he could still have been arrested and returned to Germany by that Court. *In re Krausman*, 130 Fed. Supp. 926. See also *U. S. ex rel Mobley v. Handy*, 176 F. 2d 491. Moreover, we believe that the Fifth Circuit did not give proper consideration to the case of *U. S. v.*

Chapman, 14 F. 2d 312, where the United States District Court for the Western District of Washington held that the United States Court for China at Shanghai had jurisdiction to try offenses against the United States, and that the absence of the use of the word "district" in the title of that Court did not divest it of the character of a district court for the purposes of the removal statute. See also *28 Op. Attorney General 24 (Wickersham)*.

F. With reference to the question as to whether or not the Court of Appeals erred in holding as not prejudicial, on the basis that other evidence overwhelmingly established the guilt of the Petitioners, the erroneous admission of hearsay evidence: in the context of the trial in the district court, we believe that the erroneous admission of these several hearsay statements and documents constituted a departure from the accepted and usual course of judicial proceedings on the part of the district court, which departure was so far sanctioned by the Court of Appeals as to call for an exercise of the power of supervision of the United States Supreme Court. In its opinion below the Court of Appeals stated "Although a few items of evidence were possibly erroneously admitted over objections that they were hearsay, the guilt of Appellants Harlow and Wilson was established by overwhelming competent evidence. We are satisfied, therefore, that the rulings of which Appellants complain did not prejudice them." (App. I, 25) The rulings of which Petitioners complain on the basis of the Trial Court's admission of hearsay evidence included:

(1) Testimony by the prosecuting witness McLane, agent of a vendor dealing with the European Exchange Service, as to the contents of memoranda prepared by European financial institutions and purportedly reflecting transfers of money in

favor of an account number purportedly designated by the Petitioner Harlow. (R. 153-154, 231-239)

(2) A letter purportedly written by the prosecution witness McLane in London to the Petitioner Harlow in San Antonio, Texas. (R. 174-175, 179-182)

(3) A letter purportedly sent by the prosecuting witness Emborg, agent of a vendor to the European Exchange Service, to the American Express Company, requesting transfer of funds to a Swiss bank for two numbered accounts. (R. 1046-1048)

(4) A letter from the prosecuting witness Emborg to the Petitioner Harlow respecting a purchase order and the expected transfer of a large sum of money "in the usual way." (R. 1048-1056)

(5) "Confirmations" from financial institutions purportedly received by the prosecuting witness Emborg through the mail reflecting transfers to Swiss banks in favor of numbered accounts. (R. 1027-1045)

(6) A ledger sheet purportedly prepared by the secretary of the prosecuting witness Emborg and purportedly itemizing bribes paid to accounts designated by the Petitioner Harlow. (R. 1065-1078)

We believe it fair to say that proof that the prosecuting witnesses McLane and Emborg were depositing money to numbered Swiss bank accounts designated by the Petitioner Harlow was extremely important, if not vital, to the government's case. Indeed, the Court of Appeals recognized this fact, when it justified the government's delay in bringing Petitioners to trial until June of 1960, when the government had sufficient information, in Petitioners' view, to try Petitioners as far back as 1953. The Court of Appeals stated that

during a considerable portion of this period the government "was making a bona fide and vigorous attempt to gather information about the Swiss bank accounts. These accounts played a primary role in the alleged conspiracy, and information concerning them was necessarily important to the government's case against the Appellants. Though the government's effort ultimately proved fruitless, due to the unwillingness of the Swiss authorities to divulge any information about bank accounts, this does not mean that the time spent trying to obtain this evidence constituted unnecessary and unreasonable delay." (App. I, 6)

Of course, clearly proof of deposit of money in these numbered accounts was essential to a conviction of Petitioner Harlow on substantive counts four through nine, which charged him with receiving funds from McLane and Emborg in numbered Swiss bank accounts. Further, it would seem evident that proof of deposit of money in these numbered accounts would be at least as important to a conviction of Petitioner Wilson under substantive counts two and three, charging him with the solicitation of bribes from McLane, as would be the case of the conspiracy to do the same.

Now, aside from this hearsay testimony, Petitioners suggest that there was no evidence whatsoever to show deposits in these numbered Swiss bank accounts except the testimony of the prosecuting witnesses McLane and Emborg. Petitioners suggest that the jury may very well have disbelieved that part of the testimony of McLane and Emborg in the light of the considerable amount of discredit cast upon their testimony during trial, as well as the disclosure of ample motivation to falsify in this particular.

For example, the evidence developed that McLane had previously been convicted in Federal Court in Massachusetts for

selling smuggled goods and also convicted in a German court for smuggling (R. 266-267), and further the evidence shows that the European Exchange Service had held up some $400,000 due on contracts to firms represented by him and that McLane had asked for the government's aid in unblocking these accounts, and had also asked for the government's aid to get him out of jail in Holland. (R. 273-276) Furthermore, it appeared that McLane had a contract with a man named John Lamb for the sharing of commissions on contracts with the European Exchange Service, and that McLane had not in fact shared any of his commissions with Mr. Lamb. (R. 277-279) Further on in the cross-examination of McLane, it appears that McLane himself opened a numbered account in the Credit Swiss (the bank allegedly designated by Harlow as the depository for the "bribes"). This account was apparently in the name of the deceased defendant, Paul Port. McLane admitted his signature on two documents, one stating that Port had no interest in the account, his name being used only as a convenience and as a personal favor to McLane, and the other dated about a year later stating that McLane had received all of the funds for his own use and benefit. (R. 283-287, Ex. E-F)

We think that our impeachment of McLane might have been even more emphatic if the Trial Court had not ruled that none of the documents and exchanges of correspondence between McLane and the European Exchange Service with respect to the payments to his firms which had been "blocked" by the European Exchange Service were admissible. We asked that these documents be preserved and marked for appellate consideration, but find that they were not included among the exhibits sent up to the Court of Appeals, and that the Office of the United States District Clerk for the Western District of Texas, nor the Trial Court's law clerk, nor the

Court Reporter, have any knowledge of these instruments. (R. 273-274, 291-294, 843-844, and Affidavits beginning at page 1445 of the Record)

We were also impeded in our attempts to impeach McLane by the Trial Court's overruling of our request that McLane be required to produce during cross-examination the manuscript of a proposed book he said he had written about all his experiences with the European Exchange Service, including the transactions about which he testified. (R. 289-290, 294)

Similarly, the prosecuting witness Emborg was substantially discredited. He was a citizen of Denmark, under no legal compulsion to testify (R. 1080-1081), and was not required by the Court on cross-examination to state his reason for coming to San Antonio, Texas, to testify. (R. 1109) He admitted that during his interrogation by EES investigators all kinds of threats and promises had been made to him (R. 1081). He admitted that it was hinted that if he cooperated with the investigators, his companies could continue to do business with the European Exchange Service (R. 1082, 1105). Prior to trial he had advised Petitioner Harlow's counsel by letter reply that he had turned over to the government all documentation relating to the case, yet on cross-examination he admitted that there were records in his files in Denmark respecting large sums of money withheld by European Exchange Service from his firms. (R. 1088, 1109).

Furthermore, on cross-examination Emborg was evasive and negative in his recollection of his business associations with a man named Barry Finer. A government investigator named Coleman subsequently testified that Emborg told him that he was paying "kickbacks" into a numbered Swiss bank

account furnished by Finer, and that Finer had represented to Emborg that he could continue to receive contracts if he increased his offers and put the difference into this account (R. 1171).

We believe it, therefore, evident that aside from the intrinsic value of proof of deposit of funds into numbered Swiss bank accounts designated by the Petitioner Harlow, as already discussed, it was highly important to the government's case to corroborate these discredited and discreditable prosecuting witnesses. It would seem quite evident, without elaborating on their contents, that the hearsay statements and documents which the Trial Court admitted did very definitely have the tendency to corroborate these prosecuting witnesses.

Accordingly we do not believe that it could properly be said that "the judgment was not substantially swayed by the error[s]. . . ." *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

G. With reference to the question as to whether or not the Court of Appeals erred in holding that the government had not prejudiced the Petitioners' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial: Petitioners suggest that this holding is in conflict with the holding of the United States Court of Appeals for the District of Columbia in *Williams v. U. S.*, 250 F. 2d 19, where a conviction of assault with a deadly weapon was reversed on the grounds that a seven-year delay in bringing the defendant to trial had caused him serious prejudice, and this even though this prejudicial delay was occasioned by the defendant's mental incompetence to stand trial. Furthermore, we believe that the Fifth Circuit's justification of the government's delay for the express purpose of the government's securing an advantage in the trial is in conflict with the

United States Supreme Court's per curiam affirmance in 76 S. Ct. 102 of *In re Petition of Provoo*, 17 F. R. D. 183 (U. S. D. C., Maryland, 1955).

Petitioner Harlow's verified motion, uncontested by the affidavit of government counsel in opposition to the motion to dismiss, reflected that charges similar to those contained in the instant indictment were filed against the Petitioner Harlow on or about the month of September, 1953, in the United States Court of Allied High Commission for Germany, and that since that time many of those connected with the European Exchange Service having valuable and relevant information had moved to other places of the world, and further that Paul Port, charged as a co-conspirator, and who supervised the drawing of all contracts between the Exchange System and vendors of food items, and who had full knowledge of the purchasing procedures of the European Exchange Service on the Continent of Europe, died on May 15, 1959 (R. 35-37). The indictment was not returned until April 19, 1957, and the case was not called for trial until June 6, 1960, having been set for trial by the Honorable W. R. Wallace, assigned from the Western District of Oklahoma, by a letter order dated March 23, 1960 (R. 44-45). The Court of Appeals in its opinion stated that up until about April, 1959 the government was making a vigorous effort to gather information about the Swiss bank accounts, and that shortly after the government learned that they would not secure this information, Appellants were arraigned. The Court of Appeals went on to say that from that time until the trial, a period of about one year, the Petitioners "made various discovery motions. This later delay, therefore, resulted from their own actions, and they can not now complain that it was unnecessary, and unreasonable." (App. I, 6) We believe an examination of the record will not support this very damaging hold-

ing on the part of the Court of Appeals. We believe that the first of Petitioners' motions, the same being to dismiss, to strike, and for bill of particulars, was filed on July 30, 1959 (R. 1304) and not ruled upon by the Court until March 23, 1960 (R. 44), the same day that the case was set for trial. It was thereafter that Petitioners made motions to produce documents under Rule 17(c) and motion to suppress evidence, and motion to inspect the Grand Jury minutes. We believe there is nothing in the record to show that the Court delayed the setting for the trial, or the trial, by reason of the filing of these motions. Additionally, it should be noted that Petitioner Harlow's motion to dismiss, filed on July 30, 1959, specifically assigned as a reason therefor the government's delay in bringing the case to trial. (R. 1313) It should also be noted that Judge Rives, concurring specially, in the opinion of the Fifth Circuit below in the instant case, considered that the proposition was not "well established," in the absence of a controlling decision of the Supreme Court, that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted against the accused. (App. I, 25-26)

PRAYER

WHEREFORE, Petitioners respectfully pray this Honorable Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit, commanding that the record of this cause be certified and delivered to the Supreme Court of the United States for review of the questions presented in this petition.

Respectfully submitted,

JOEL W. WESTBROOK, Esq.
306 Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

CHARLES E. WILSON, pro se
(Pending Admission to the Bar
of the Supreme Court of
James Gillespie, Esquire)

IN THE

Supreme Court of the United States

NO. _____

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Appendix I to Petition for Certiorari

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18865

JAMES W. HARLOW, CHARLES E. WILSON and THOMAS F. ADDY,

Appellants,

versus

UNITED STATES OF AMERICA

Appellee.

Appeals from the United States District Court for the Western District of Texas.

(April 4, 1962)

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: The three appellants are former civilian employees of the European Exchange System (EES) which was established after World War II to operate various facilities, including the well-known military Post Exchanges, for the benefit of United States servicemen and other authorized personnel stationed in Europe. The appellants have been convicted of certain offenses relating gen-

erally to their alleged participation in a scheme involving the solicitation and receipt of bribes and kickbacks from certain vendors to the EES.

The indictment was returned against appellants on April 19, 1957. The first count charged them with the conspiring amongst themselves and with "other persons to the grand jury unknown "[1] to defraud the United States, in violation of 18 U.S.C.A. Section 371:[2]

> "One: Of and concerning its rights to have the business affairs, activities and functions, of the said European Exchange System, honestly and efficiently administered, exercised and performed, free from unlawful impairment, obstruction, or corruption, and collusion between employees of said agency and persons seeking to sell food products and other merchandise to said agency.
>
> "Two: Of and concerning its right to have contracts for the purchase of foodstuffs and other merchandise, which were entered into by EES, awarded in accordance with the established procedures and in an honest and businesslike manner, free from the solicitation and acceptance of money by the employees of said EES from persons, firms and

[1]The indictment also named one Paul Port as a co-conspirator, but Port died prior to the trial.

[2]"§371. Conspiracy to commit offense or to defraud United States.
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C.A. §371.

corporations, as bribes, kickbacks, commissions or otherwise.

"Three: Of and concerning its right to conscientious, faithful and honest services, decisions, actions and performances of the duties of its employees in said EES, free from corruption, partiality, improper influence and dishonesty, and from the solicitation or acceptance of money and things of value by its said employees from persons, corporations, and firms engaged in selling and endeavoring to sell foodstuffs and other merchandise, products and property to the said EES."

The second and third counts of the indictment charged the appellant Wilson with soliciting bribes on two occasions from Robert T. McLane, a representative of firms selling to the EES, in violation of 18 U.S.C.A. Section 202.[3] Counts four through nine charged the appellant Harlow with receiving bribes from Robert T. McLane and Henrik Emborg

[3] "§ 202. Accepting or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States." 18 U.S.C.A. §202.

(also a representative of suppliers to the EES), in violation of 18 U.S.C.A. Section 202.

The appellants were convicted as charged on June 16, 1960, in the United States District Court for the Western District of Texas, San Antonio Division. Judgments were entered and sentences imposed on February 14, 1961. This appeal followed.

Before discussing the numerous and varied contentions urged by the appellants, it would be well to describe briefly the scheme of corruption which the Government attempted to establish. In 1950, Harlow was Chief of the Food and Services Branch of the EES in Germany. In this capacity he possessed authority to negotiate for the purchase of various supplies and services by the EES from vendors throughout Europe. Appellant Wilson was Harlow's assistant; appellant Addy was the EES Chief of Security. Very simply, the Government sought to prove that the appellants and other civilian employees of the EES, known collectively as "the organization," induced certain vendors to pay them for the privilege of doing business with the EES. Those who paid were rewarded with contracts to supply the EES; those who did not received less favorable action on their bids. Bribe payments were allegedly channelled to the members of "the organization" through certain numbered bank accounts which "the organization" had established with various banks in Switzerland. This lucrative scheme is supposed to have continued from 1950 through 1953, at which time "the organization" was exposed and its illegal operations brought to a halt by the authorities.

The first contention pressed by the appellants is that the

trial court abused its discretion in refusing to dismiss the indictment on the ground that the Government "prejudiced appellants' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial." The argument here is that the Government had sufficient information to try appellants as far back as 1953, and that the failure of the Government to bring them to trial until June, 1960, prejudiced their defense because various witnesses and records which might have aided their defense became unavailable during the seven year delay. We find no merit in this claim.

It is well established that the right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48(b) of the Federal Rules of Criminal Procedure[4] does not arise until after a prosecution is instituted against the accused. Any delay occurring between commission of the offense and commencement of prosecution is controlled exclusively by the applicable Statute of Limitations. *Hoopengarner v. United States*, 6 Cir., 270 F. 2d 465. In the instant case, criminal proceedings were formally initiated against the appellants when the indictment was returned against them on April 19, 1957. Since the indictment was returned within the allowable statutory period,[5] the only delay of

---

[4]Rule 48 (b) provides:

"If there is unnecessary delay in presenting to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

[5]The conspiracy stated in count one of the indictment was alleged and proven to have continued through 1953, and various overt acts in furtherance of the conspiracy were alleged and proven to have been committed in 1953. The substantive offenses stated in counts two and three were alleged and proven to have been committed in 1953, and the offenses stated in counts four through nine were alleged and proven to have been committed

which appellants might complain is the delay between the date the indictment was returned [i.e. April 19, 1957] and the date they were brought to trial [i.e. June 6, 1960].

There are two reasons why appellants cannot succeed in their claim that they were denied a speedy trial. First, we do not think that the delay could be characterized as "unnecessary" or "unreasonable." Prior to April, 1957, and up to about April, 1959, the Government was making a bona fide and vigorous effort to gather information about the Swiss bank accounts. These accounts played a primary role in the alleged conspiracy, and information concerning them was necessarily important to the Government's case against the appellants. Though the Government's effort ultimately proved fruitless, due to the unwillingness of the Swiss authorities to divulge any information about the bank accounts, this does not mean that the time spent trying to obtain this evidence constituted unnecessary and unreasonable delay. See *Foley v. United States*, 8 Cir., 290 F. 2d 562. Appellants were arraigned soon after the Government learned that the information concerning the bank accounts would not be forthcoming. From that time until the trial, a period of about one year, the appellants made various discovery motions. This later delay, therefore, resulted from their own actions, and they cannot now complain that it was unnecessary and unreasonable. *United States v. Lustman*, 2 Cir., 258 F. 2d 475, cert. denied 358 U.S. 880.

Furthermore, even if the delay was unreasonable, appel-

between June and November, 1952. The period of limitations for all the offenses charged in the indictment is five years. 18 U.S.C.A. § 3282. The indictment returned on April 19, 1957, was, therefore, timely.

lants would be in no position to complain of it, since they never demanded an earlier trial. It is undisputed that the Government would have and could have gone to trial prior to June, 1960, if the appellants had so requested, despite the continuing unavailability of the information regarding the Swiss bank accounts. But appellants never complained of the delay until they made their motions to dismiss when the time for trial had arrived. The settled rule in the federal courts is that, under such circumstances, the appellants waived their right to challenge the legality of the Government's delay in bringing them to trial. United States v. Lustman, *supra*.

The appellants next contend that the conspiracy count should have been dismissed on the ground that it was too "vague and indefinite." This argument is likewise without merit. The indictment, in substance, charged the appellants with conspiring with "others" to defraud the United States of its right to have its European Post Exchanges honestly administered by agreeing to receive bribes from McLane, Emborg "and others" with respect to the sale of foodstuffs and "other merchandise" by these vendors to the EES. The gist of appellants' argument here is that the indictment should have specified the "other conspirators," and "other vendors" and the "other merchandise." We do not think such specificity was required. The indictment provided appellants with adequate information to prepare their defense. It outlined the general scope of the conspiracy and charged that it was part of the conspiracy that appellants would cause vendors or agents of vendors who were supplying merchandise to the EES to pay money into numbered bank accounts in Switzerland for the benefit of appellants. Numerous overt acts in furtherance of the conspiracy were

detailed. A bill of particulars voluntarily submitted by the Government set forth (1) that McLane and Emborg were the agents of vendors alleged to have been induced to pay bribe money; (2) the numbers of the numbered bank accounts; (3) the name and location of the banks; (4) the dates and amounts of money so paid; (5) the names and addresses of the vendors represented by Emborg and the type of foodstuffs sold by them; (6) the manner in which the appellants caused the bribe money to be deposited in the numbered accounts; and (7) the vendors represented by McLane. Moreover, since the Government did not attempt to prove transactions with vendors or agents of vendors other than McLane and Emborg or transactions relative to the sale of merchandise other than foodstuffs,[6] it is apparent that appellants were not seriously prejudiced by the indictment's reference to "other vendors" and "other merchandise." The failure of the Government to call any "other conspirators" or "other vendors" as witnesses against the appellants similarly negatived any chance of serious prejudice to appellants. In short, though the references to "other conspirators," "other vendors" and "other merchandise" may have rendered the indictment somewhat vague and uncertain, we are satisfied that this did not deprive the appellants of any substantial right.[7]

[6]There is one significant exception to this statement which will be discussed below in connection with the Government's attempt to establish appellant Addy's participation in the conspiracy.

[7]This discussion should also dispose of the contentions that the trial court erred in refusing to permit the appellants to examine the grand jury's minutes and in refusing to compel the Government to submit a second bill of particulars. The indictment itself and the bill of particulars voluntarily submitted by the Government provided appellants with adequate information to conduct their defense. We are also of the opinion that appellants were not seriously prejudiced by the Government's apparent failure to produce certain documents in accordance with the trial court's order that it produce all documents in its pos-

We now reach appellant Addy's contention that there was insufficient evidence to support the jury's verdict that he was a participant in the conspiracy charged in count 1 of the indictment. The Government apparently conceded that the indictment would be insufficient as to the appellant Addy if it merely charged him with conspiring with persons *other than* appellants Wilson and Harlow to solicit and receive bribes from vendors or agents of vendors *other than* McLane and Emborg. In other words, the Government admits that the substance of the charge against Addy is that he was a participant in a conspiracy involving Harlow and Wilson, whereby these appellants agreed to defraud the United States by receiving bribes from McLane and Emborg. Thus, if there is no competent evidence linking Addy with the activities of the other appellants, Addy's conviction must be overturned. We think there is no such competent evidence.

Some time in 1951, the highest authorities in the EES began to suspect that EES employees were soliciting and receiving bribes from vendors to the EES. In or about July, 1952, appellant Addy was first suspected of complicity in the bribery scheme. In order to expose this scheme, it was decided that two EES agents, namely, Bray and Stewart, would attempt to work their way into "the organization" through Addy. Bray and Stewart thus approached Addy and attempted to interest him in the possibility of taking bribes from vendors to the EES. Bray and Stewart testified

session which it had received from McLane and Emborg. The Government substantially complied with this order. The documents which were not produced were not of such significance as to make their non-production, and the consequent inability of defense counsel to examine them before trial, a ground for reversing appellants' convictions.

that Addy went along with their suggestions and that arrangements were made and carried out whereby Bray, Stewart and Addy engaged in the solicitation and receipt of bribes from various vendors. None of these transactions, however, involved Wilson and Harlow, on the one hand, or McLane and Emborg on the other; and, although the testimony of Bray and Stewart indicates that Addy was aware of "the organization" and its activities, there is no competent testimony showing that Addy was in fact a member of "the organization." The only evidence on this point is the testimony of McLane to the effect that Harlow and Wilson told him on various occasions that Addy was a member of "the organization." But this was obviously hearsay as to Addy, and it was incompetent to link Addy with the main conspiracy charged in count one of the indictment. *Montford v. United States*, 5 Cir., 200 F. 2d 759. At most, the Government established the existence of two separate conspiracies, one involving Harlow and Wilson and possibly others; and the other involving Addy, Stewart and Bray.* Since the Government attempted to establish Addy's guilt on the basis of his assumed participation in a conspiracy with Harlow and Wilson it would be manifestly unjust to permit Addy's conviction to stand on the ground that it was proved that he had conspired with Bray and Stewart. Especially is this true when considered in light of the fact that the indictment and bill of particulars failed to disclose even the haziest outlines of a conspiracy between Addy, Stewart and Bray to solicit and receive bribes from vendors

*Because of the view which we take of the case, it is unnecessary to consider whether appellant Addy could successfully contend that he was "entrapped" into the conspiracy with Bray and Ste t.

other than McLane and Emborg. We conclude, therefore, that appellant Addy's conviction should be reversed for lack of evidence.

Assuming the existence of two separate conspiracies, appellants Harlow and Wilson claim that this requires us to hold that there was a fatal variance between the proof, which showed two conspiracies, and the indictment, which charged only one conspiracy. But this Court has already held that:

> "If more than one conspiracy was proved, of at least one of which the appellant was guilty, it is clear that there was no variance affecting his substantial rights." Jolley v. United States, 232 F. 2d 84, 88, 5 Cir.

The evidence of Harlow's and Wilson's participation in the main conspiracy is overwhelming. Thus, the variance, if any, could not "affect [their] substantial rights."

Appellants Harlow and Wilson contend that the substantive counts of the indictment (i.e. counts two through nine) charging them with violations of 18 U.S.C.A. Section 202 should have been dismissed (1) on the ground that venue was improperly laid in the District Court for the Western District of Texas; (2) on the ground that, as civilian employees of the EES, they do not come within the purview of 18 U.S.C.A. Section 202; and (3) on the ground that there was insufficient evidence to justify submission of the question of their guilt to a jury. We think all these contentions must fail.

(1) The Government sought to lay venue in this case in the Western District of Texas under 18 U.S.C.A. Section 3238. That section reads as follows:

> "§3238. Offenses not committed in any district.
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

Each of the substantive counts alleged that the offenses were committed out of the jurisdiction of any particular state or district and that the appellants, since the commission of the offenses, had returned to the United States and, on the date of the return of the indictment, were found in the Western District of Texas.[9] Appellants contend, however, that the offenses were not committed out of the jurisdiction of "any particular state or district"; they claim that the territory occupied by the United States in Germany and governed by the United States High Commissioner for Germany was a "district" within the meaning of Section 3238, that the former United States Court of the Allied High Commission of Germany had jurisdiction over this "district," and that the offenses were committed within this

[9]Appellant Harlow contends that the allegations of counts five through nine were not sufficient to establish venue in the Western District of Texas under Section 3238 because there was no specific allegation that the offenses charged therein were committed "out of the jurisdiction of any particular state or district." These counts, however, did expressly allege that the bribe money, at Harlow's request, was deposited in a certain numbered bank account in Switzerland. We think this was sufficient to establish that the offenses involving the "receipt" of bribe money were committed in Switzerland, which is, of course, "out of the jurisdiction of any particular state or district."

"district." They conclude from this that the High Commission Court had exclusive jurisdiction to try them for the offenses charged in the indictment.

We cannot agree. Since Section 3238 has been the subject of infrequent litigation, there is scant precedent to guide us in resolving the issue raised by appellants' argument. That issue, simply stated, is whether the German occupied territory under the jurisdiction of the High Commission Court was a "district" within the meaning of Section 3238. We think that it was not. In our view, territory governed by the United States is not a "district" under Section 3238 unless the court having jurisdiction over that territory is invested with the same power as ordinary district courts to try offenses made such by laws of Congress. We cannot believe that Congress meant to preclude the district courts from exercising jurisdiction over an offense against the laws of the United States simply because the acts constituting the offense were committed within the territorial jurisdiction of a military or quasi-military tribunal deriving its authority from the United States Government, but having no power to punish those acts as an offense against the laws of the United States. *United States v. Newth*, 149 Fed. 302. The High Commission Court did not have jurisdiction to try appellants for violating Section 202 of 18 U.S.C.A., though it had the power to punish them if their acts transgressed the laws of the Allied High Commission or the laws of the occupied territory.[10] Under these circumstances, we

[10]The High Commission Court has jurisdiction over:
"(i) All offenses against the laws and usages of war.
(ii) All offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

think that the "offenses" charged in the present indictment were committed outside the jurisdiction of "any particular state or district" and that venue was therefore properly laid in the District Court for the Western District of Texas under 18 U.S.C.A. Section 3238.

(2) 18 U.S.C.A. Section 202, in substance, makes it a crime for any "employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof" to solicit or receive bribes. Appellants Harlow and Wilson claim that a civilian employee of EES is neither an "employee of" the United States nor a "person acting for or on behalf of the United States," so as to come within the prohibitions of Section 202. We think otherwise.

Appellants' argument in this regard is bottomed on two facts; first, that their employment contracts with the EES specifically stated that an EES employee is "not considered to be a Federal employee," and second, that EES is a non-appropriated funds activity, the employees of which, under 5 U.S.C.A. Section 150(k), are not "considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees Compensation Act."

Though there is doubt that the appellants, as EES employees, could be considered federal employees within the meaning of Section 202, we are nevertheless convinced that

---

(iii) All offenses under the laws of the occupied territory, or of any part thereof."
United States Military Government Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2190-2191.

they were at least "persons acting for or on behalf of the United States" within the purview of that statute. In *Standard Oil Company v. Johnson*, 316 U.S. 481, post exchanges were held immune from state taxation on the ground that they "are arms of the Government deemed by it essential for the performance of governmental functions"; the Court further stated that post exchanges are "integral parts of the War Department." It is significant that appellants' employment contracts, though negativing their position as federal employees, expressely stated that the EES "is an instrumentality of the United States Government and an organization of the Department of the Army." It is likewise significant that 5 U.S.C.A. Section 150(k) expressly provided that that statute would not affect "the status of these non-appropriated fund activities as Federal instrumentalities." We have no doubt, therefore, that the EES is an instrumentality of the United States Government and that appellants, as employees of this instrumentality, were acting "for or on behalf of" the United States so as to bring them within the prohibitions of 18 U.S.C.A. Section 202. See *Canella v. United States*, 9 Cir., 157 F. 2d 470, and the annotations in 18 U.S.C.A. Section 202.

(3) Counts two and three of the indictment charged that appellant Wilson on August 11, 1953, and August 12, 1953, telephoned McLane in Brussels, Belgium and asked him to deposit bribe money to the account of the Gulf States Trading Company, which had been established by the appellants Harlow and Wilson. The Government conclusively established that Wilson telephoned McLane in Brussels on July 31, 1953, and discussed the deposit of bribe money to the account of the Gulf States Trading Company. It was also proven that McLane telephoned Wilson on August 6th, 11th

and 15th, 1953, and spoke to him about this deposit. We think this proof sufficiently established Wilson's guilt under counts two and three. Who made the telephone calls and on what specific dates were obviously factors of little materiality to the charges against Wilson.

Counts four through nine charged Harlow with receiving bribe money from McLane and Emborg. As to these counts, the Government's proof showed clearly that McLane and Emborg had deposited money in certain numbered bank accounts at Harlow's request. Harlow claims, however, that there was no evidence that he actually received any of this money. We think this contention to be frivolous. In our view the deposit of money into accounts designated by Harlow constituted constructive if not actual receipt of this money by Harlow. Proof of these deposits was therefore sufficient to establish Harlow's guilt under counts four through nine.

Appellants Harlow and Wilson next contend that the trial court erred in denying their motions to suppress evidence. This evidence consisted of certain incriminating letters which were written by Harlow after he had returned to San Antonio sometime in 1953 to Wilson in Germany. These letters had been seized from Wilson's quarters by EES agents under a warrant issued by Judge Turmo of the United States Court of the Allied High Commission. The warrant was issued on an affidavit prepared by one Canfield, who was at that time a prosecutor in the seventh Judicial District of the Courts of the Allied High Commission for Germany. Since Canfield's affidavit could not be located by the Government at the time of trial, the Government sought to prove its contents by the oral testimony of Canfield himself, by the testimony of Judge Turmo, who

issued the warrant, and by the testimony of Warrant Officer Coleman, who was in charge of the EES investigation of "the organization." Appellants objected to this testimony on the ground that the Government had not established a proper predicate, the contention being that oral testimony could not be received to establish the contents of the affidavit until the Government first proved that a diligent search had been made for the document by its last known custodian and that it had been lost through no fault of the Government. After this objection was made, the Government secured a certificate from a Legal Officer at the Embassy of the United States at Bad Godesburg, Germany,[11] stating that he had made a diligent search for the affidavit but that it could not be found.

Appellants contend, however, that there is no indication that defense counsel ever received the original certificate or that the trial court ever examined it to see whether it justified the receipt of the oral testimony.[12] Assuming this to be true, however, we think it is quite immaterial. Since the certificate obviously constituted an adequate predicate for the admission of the oral testimony relative to the contents of the affidavit,[13] we are unable to say that appellants were seriously prejudiced by the facts of which they now complain.

Appellants then argue that, even if the certificate was an adequate predicate for the admission of oral testimony,

[11]Apparently, the records and files of the former United States Court of the Allied High Commission for Germany are now kept in various United States embassies in the Federal Republic of Germany.
[12]How or why this occurred is not entirely clear from the record.
[13]See Rule 27 of the Federal Rules of Criminal Procedure and Rule 44 (b) of the Federal Rules of Civil Procedure.

this testimony was insufficient to establish the requisite probable cause for issuance of the search warrant. We disagree. Canfield testified that the basis for his application for the warrant was information furnished him by McLane and Emborg through oral conversation and in written statements: McLane and Emborg had exposed the whole bribery scheme, and had told the EES agents of their deposits of bribe money into the numbered bank accounts at the request of Harlow and Wilson. The testimony of Warrant Officer Coleman and Judge Turmo was to the same effect. Certainly, there was probable cause to issue the search warrant on the basis of the information given by McLane and Emborg that they had paid Wilson for getting them contracts to supply the EES.

At the trial it came out that the EES agents investigating the bribery scheme had been intercepting and photostating Wilson's mail prior to the time that the letters from Harlow to Wilson were seized by the agents under the search warrant. McLane testified that the agents told him of these interceptions when they were interrogating him. Appellants thereafter moved for a mistrial on the ground that the above testimony demonstrated that the Harlow-Wilson letters had been improperly admitted, in that the warrant for the seizure of these letters was procured on the basis of information gathered by the investigating agents as the result of the illegal mail interceptions. In other words, appellants claimed (a) that McLane was interrogated only after the investigating agents learned of his participation in the bribery scheme by examining the letters which had been illegally intercepted; (b) that McLane thereafter confessed and persuaded Emborg to confess; and (c) that the confessions of McLane and Emborg were the basis for the

issuance of the search warrant. From this appellants concluded that the evidence seized under the search warrant was the ultimate product of the illegal seizure of Wilson's mail.[14]

The trial court denied the motion for a mistrial on the ground that "the letters were obtained as a direct result of an origin wholly independent of the unlawful interception." This "wholly independent" lead to McLane was identified as a letter which had been sent to the FBI in the United States by a Dutch banker named Hoogervorst and which had come through Army channels to the investigating agents prior to the interceptions of Wilson's mail. The information supplied by Hoogervorst was to the effect that McLane was making large monthly transfers of money from banks in Holland to banks in Switzerland. After this letter was received, agent Coleman visited Hoogervorst in Amsterdam. Coleman testified that Hoogervorst could not understand how McLane "was making all these money transfers into Swiss banks" when he was employed by Dutch firms; that Hoogervorst said he could get documents to prove that McLane was shipping out some $4000 to $5000 a month to the Credit Swiss Bank in Basle, Switzerland; that he, Coleman, returned and told his superiors what he had learned and that he could get copies of these bank transfers from Hoogervorst. Coleman testified further that Hoogervorst produced the documents and that they were photostated by the investigating agents, and that this information which had been received from Hoogervorst was the initial stimulus to the investigation of McLane.

[14] We think it clear that appellant Harlow, as the author of the letters which were seized, had a sufficient interest in these letters to enable him to attack the alleged illegality of their seizure. Cf. Henzel v. United States, 5 Cir., 296 F. 2d 650.

We agree with the trial court's disposition of this issue. Knowing that McLane was a representative of a number of firms selling to the EES, and suspecting the existence of a bribery scheme whereby vendors or their agents would deposit bribe money in Swiss bank accounts, the information received from Hoogervorst naturally led the investigating agents to suspect that McLane was somehow involved in the scheme. The investigating agents were not forever precluded from interrogating McLane and pressing him to confess merely because they thereafter illegally seized other evidence tending to implicate McLane in the bribery scheme. McLane did not indicate that he would not have confessed if he had not been told of the interceptions of Wilson's mail by the investigating agents.[15] For all we know, McLane would have told all regardless of whether this information was imparted to him by the investigating agents. Knowing that he was suspected of paying bribes to Harlow and Wilson, and confronted with the documentary evidence of his money transfers to Swiss banks, McLane may well have been persuaded that the "jig was up" and that it would be best for him to make a full disclosure of his dealings with Harlow and Wilson. We are unable to say, therefore, that the information received from McLane, which led to the search of Wilson's quarters, was the ultimate product of the illegal interceptions of Wilson's mail. The burden was on the appellants to establish that a substantial part of the case against them was "a fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341. In our opinion, appellants failed to carry this burden. The

[15]It might be noted that agent Coleman, who interrogated McLane, denied ever informing him of these interceptions. However, the trial court apparently found to the contrary on the basis of McLane's testimony, and we cannot say that his finding was clearly erroneous.

trial court thus did not err in denying the motion for a mistrial. See *United States v. Bell*, D.C.D.C., 126 F. Supp. 612.

We come now to appellant Wilson's plea that his trial and conviction on the conspiracy charge violated the constitutional prohibition against double jeopardy. This plea is based on the fact that, in March, 1954, Wilson was convicted before the United States Court of the Allied High Commission for Germany for conspiring with Harlow and others to receive bribes from persons selling merchandise to the EES, in violation of the Laws of the Allied High Commission.[16] Wilson was sentenced to six months in prison but was released before the entire sentence was served after he promised to cooperate with the authorities in their further investigation of "the organization." The plea of double jeopardy based on the above conviction was rejected by the court below.

There are always two questions which must be resolved when a defendant in a criminal case interposes a plea of former jeopardy. The first is whether both tribunals before which the defendant was tried derived their authority and jurisdiction from the same sovereign;[17] the second is

[16]Wilson was also tried for "receiving" bribes, in violation of the Laws of the Allied High Commission and Paragraph 266 of the German Criminal Code relating to breach of trust. He was acquitted on these charges. Wilson apparently concedes that his acquittal on the charges of *receiving* bribes was not a bar to his prosecution for *conspiring* to receive bribes and for *soliciting* bribes. See United States v. Bayer, 331 U. S. 532, 542.

[17]United States v. Grafton, 206 U. S. 333, 352. Neither the Fifth nor the Fourteenth Amendments prohibit multiple prosecutions by different sovereigns, even though the prosecutions are based on the same facts and require the same evidence to sustain them. See Bartkus v. United States, 359 U. S. 121 and Abbate v. United States, 359 U. S. 187.

whether both prosecutions were for the same "offense." Thus, in the instant case, we must determine (1) whether the United States Court of the Allied High Commission for Germany derived its authority and jurisdiction from the United States and (2) whether the offense of conspiracy for which Wilson was convicted below was the same offense for which he was convicted in the High Commission Court.

As to the first question, there can be no doubt that the former United States Court of the Allied High Commission for Germany derived its authority and jurisdiction from the United States. *Madsen v. Kinsella*, 343 U.S. 341, made this absolutely clear. In that case the Supreme Court fully discussed the history and nature of the High Commission Court.

Nor can there be any doubt that an acquittal or conviction before a military or quasi-military tribunal deriving its authority and jurisdiction from the United States can be set up as a bar to another prosecution for the same offense before a civil court of the United States. This has been the law at least since the Supreme Court decided *Grafton v. United States*, 206 U.S. 333. In that case it was held that a soldier acquitted of the crime of homicide by a military court-martial of competent jurisdiction proceeding under the authority of the United States could not subsequently be tried for the same offense in a civil court deriving its authority from the United States. The Court spoke in these words:

> ". . . . The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the

Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that 'no person' — referring, we take it, to persons in the Army — 'shall be tried a second time for the same offense.' But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government . . . . ."

We come then to the question of whether Wilson's conviction on count one of the instant indictment relates to the same offense for which he was convicted in the High Commission Court. As to this question, it is now settled that "the test of identity of offenses is whether the same evidence is required to sustain them." *Morgan v. Devine*, 237 U.S. 632, 641. That the offenses are not "the same in name" is immaterial. *Grafton v. United States*, *supra*, at 351. Thus, the ultimate issue here is whether the proof required to sustain Wilson's conviction on count one of the instant indictment was the same proof as was required to sustain his conviction for violating the Laws of the Allied High Commission. We think that it was.

The essence of both conspiracy charges was that Wilson had agreed that Harlow and others to receive bribes from persons selling merchandise to the EES. Both charges involved the same agreement, the same vendors, the same merchandise, the same numbered bank accounts, etc. In short, both charges related to one continuing conspiracy and to Wilson's participation in it. The evidence adduced at both trials demonstrating Wilson's participation in the conspiracy was substantially identical. Nothing of significance that was proven at the second trial had not already been proven at the first. This evidence was sufficient to sustain Wilson's conviction for violating the Laws of the Allied High Commission and for violating 18 U.S.C.A. Section 371. The offenses, though not "the same in name," were the same in fact. Since Wilson has already been convicted for conspiring with Harlow to take bribes from McLane and Emborg, his conviction on count one of the indictment for the same offense cannot be allowed to stand. It clearly vio-

lates Wilson's constitutional right to be free of successive prosecutions for the same offense.

Finally, the appellants have raised numerous issues with respect to the trial court's charge and with respect to the admission and exclusion of various items of evidence. We have carefully examined the trial court's instructions to the jury and find them adequate. Although a few items of evidence were possibly erroneously admitted over objections that they were hearsay, the guilt of appellants Harlow and Wilson was established by overwhelming competent evidence. We are satisfied, therefore, that the rulings of which appellants complain did not prejudice them.

For the reasons above stated, (1) the conviction of appellant Harlow on all counts is AFFIRMED; (2) the conviction of appellant Wilson on counts two and three is AFFIRMED; (3) the conviction of appellant Wilson on count one is REVERSED; and (4) the conviction of appellant Addy on count one is REVERSED.

RIVES, Circuit Judge, Concurring specially:

I concur in the result, but differ from one part of the opinion which seems to me not necessary for the result. The statement in the opinion that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted against the accused is supported by several opinions of Courts of Appeals. See *Foley v. United States*, 8 Cir., 1961, 290 F. 2d 562, 565, and cases there cited. It does not seem to me, however, that that

proposition is "well established" in the absence of a controlling decision of the Supreme Court; and, with deference, I am not convinced that it is sound. I forego expressing reasons for my doubts because I am satisfied that, under the facts of this case, there was no unnecessary and unreasonable delay at any stage, either before the prosecution was instituted or afterward. In all other respects, I am in full accord with the comprehensive and able opinion. I therefore concur specially.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By GILBERT F. GANUCHIAN
Deputy

New Orleans, Louisiana, May 14, 1962.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs. Inc., N. O., La.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes and rule involved	3
Statement	4
The evidence at trial	6
History of the case	7
Argument	9
Conclusion	26

CITATIONS

Cases:	
Abbate v. *United States*, 359 U.S. 187	6
Bartkus v. *United States*, 359 U.S. 121	6
Beavers v. *Haubert*, 198 U.S. 77	14
Clay v. *United States*, 246 F. 2d 298, certiorari denied, 355 U.S. 863	24
Daniels v. *Chanute A.F.B. Exchange*, 127 F. Supp. 920	11
Harris v. *United States*, 331 U.S. 145	24
Jones v. *United States*, 137 U.S. 202	12
Madsen v. *Kinsella*, 343 U.S. 341	12, 13
Pollard v. *United States*, 352 U.S. 354	14
Standard Oil Company v. *Johnson*, 316 U.S. 481	11
United States v. *Krichman*, 256 U.S. 363	11
United States v. *Lustman*, 258 F. 2d 475, certiorari denied, 358 U.S. 880	15
United States v. *Newth*, 149 Fed. 302	13

Cases—Continued

	Page
Wilson v. *United States*, 230 F. 2d 521, certiorari denied, 351 U.S. 931	10
Zacher v. *United States*, 227 F. 2d 219, certiorari denied	25
Statutes and rule:	
Federal Business Records Act, 28 U.S.C. 1732	25
18 U.S.C. 6	11
18 U.S.C. 201	10, 11
18 U.S.C. 202	3, 5, 9, 10, 12, 13
18 U.S.C. 371	4
18 U.S.C. 3238	3, 12
Rule 48, Federal Rules of Criminal Procedure	3, 13
Miscellaneous:	
12 F.R. 2190–2191	13
McCormick, *Evidence*, pp. 14–18	25
28 Op. Atty. Gen. 24	12
Reviser's Notes, 18 U.S.C.:	
Section 201	10
Section 202	10
Wigmore, *Evidence* (3rd ed.):	
§758	25
§734 *et. seq*	25
§95	25

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 149

JAMES W. HARLOW AND CHARLES E. WILSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–26) is reported at 301 F. 2d 361.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1962. A petition for a rehearing was denied on April 30, 1962 (R. 1781). The petition for a writ of certiorari was filed on May 29, 1962. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were "person[s] acting for or on behalf of the United States" amenable to prosecution for bribery under 18 U.S.C. 202.

2. Whether the substantive offenses charged under 18 U.S.C. 202 were committed "out of the jurisdiction of any particular State or district" so as to justify laying venue at the place where petitioners were found under 18 U.S.C. 3238.

3. Whether the government was guilty of deliberate and unnecessary delay in bringing this case to trial, to the prejudice of petitioners.

4. Whether the conspiracy charge was alleged with sufficient specificity to enable the defendants to prepare a defense.

5. Whether the conviction of the petitioner Harlow for conspiracy was subject to reversal because the government's evidence showed the existence of a possible unrelated conspiracy in which he was not involved.

6. Whether letters seized under a search warrant should have been suppressed, and the subsidiary questions:

a. Whether, in the absence of the underlying affidavit, certified to have been lost, there was sufficient evidence of probable cause for issuance of the warrant;

b. Whether there was sufficient evidence of independent leads, untainted by alleged mail interception, to the information supporting issuance of the warrant;

c. Whether the warrant described the letters with sufficient particularity.

7. Whether petitioners were prejudiced by the admission of purported hearsay evidence.

STATUTES AND RULE INVOLVED

Section 202 of Title 18, U.S.C., provides:

> Whoever, being an officer or employee of, or person acting for or in behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States.

Section 3238 of Title 18, U.S.C., provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Rule 48 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) If there is unnecessary delay in presenting the charge to a grand jury or in filing an

information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

An indictment returned on April 19, 1957, in the United States District Court for the Western District of Texas, accused petitioners, former civilian employees of the European Exchange System (hereinafter designated as EES), an organization operating "post-exchanges" for United States personnel in Europe, of soliciting and receiving bribes and kickbacks from vendors supplying EES in Europe. Count I of the indictment charged that, between 1950 and 1954, in San Antonio and various points in Europe, petitioners, together with one Addy and one Port,[1] conspired among themselves and "other persons to the grand jury unknown" (in violation of 18 U.S.C. 371) to defraud the United States of its rights to have the business activities of EES honestly administered, to have the contracts of EES for purchases of merchandise honestly awarded, and to have the honest services of EES employees. Counts II and III charged the petitioner Wilson with soliciting bribes on two occasions in 1953 from Robert T. McLane, a representative of EES suppliers; and Counts IV through IX charged the petitioner, Harlow, with receiving bribes

[1] Port died prior to trial. Addy was convicted with petitioners but the court of appeals reversed his conviction on the ground that there was insufficient evidence to convict him of the conspiracy charged.

in 1952 from McLane and one Henrik Emborg (another supplier), in violation of 18 U.S.C. 202. Each of the substantive counts alleged that the offenses were committed out of the jurisdiction of the United States and that the defendants, since the commission of the acts charged, had returned to the United States, resided in San Antonio, and, on the date of the indictment, were found in the Western District of Texas. (R. 2–19.)

After a jury trial commencing on June 6, 1960, the defendants were convicted (R. 1273 *et seq.*). On February 14, 1961, petitioner Harlow was sentenced to pay a $10,000 fine and to serve a total term of imprisonment of eleven years—(five years on Count I, three years on Count IV to run consecutively to the sentence imposed on Count I, three years on Count V to run consecutively to the sentence on Count IV, and three years on each of the Counts VI through IX, to run concurrently with various sentences imposed on the prior counts). On the same day, petitioner Wilson was sentenced to serve a total term of imprisonment of eight years (five years on the conspiracy Count I, three years on Count II to run consecutively with the sentence on Count I, and three years on Count III to run concurrently with the sentence on Count II). (R. 1279).

On appeal, Harlow's conviction was affirmed on all counts. The conviction of the petitioner Wilson was affirmed as to the substantive counts, but reversed as to the conspiracy count on the ground that he had previously been convicted (in March, 1954) before the United States Court of the Allied High Com-

mission for Germany for the same offense. (R. 1748–1774.)[2]

THE EVIDENCE AT THE TRIAL

Briefly, the government's evidence revealed a scheme whereby petitioner Harlow, as Chief of the Food and Services Branch of EES in Germany (with authority to negotiate for purchases from vendors throughout Europe) and petitioner Wilson, his assistant and subsequently his successor, induced vendors to pay them for the award of contracts with EES. The suppliers made the payments by transferring funds into numbered bank accounts in Switzerland.

The proof was developed mainly through the testimony of two representatives of vendors—McLane, who testified that, under instructions from petitioners, he transferred about $200,000 into numbered accounts (and in addition delivered cash payments)—and Emborg, who testified that he deposited in such accounts some $35,000 to $45,000. Their testimony was corroborated by bank confirmations, by letters from Harlow to Wilson and McLane (alleged as overt acts in the conspiracy count), by recordings of conversations between Wilson and McLane made when McLane was cooperating with government investigators, and by the testimony of the government investigators.

---

[2] Without conceding the correctness of this holding (see *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187), we have acquiesced in the result, inasmuch as Wilson's conviction was sustained on the substantive counts. As to the executive policy in matters of this kind, see note 3, *infra*.

HISTORY OF THE CASE

The criminal conduct here charged was first suspected by EES authorities in Europe in 1951–1952. An investigation ensued and, in 1954, at a time when the petitioner Harlow had returned to the United States, Wilson was charged and convicted before the United States Court of the Allied High Commission for Germany of conspiring with Harlow and others to receive bribes from persons selling merchandise to the EES in violation of the Laws of the Allied High Commission. Wilson was sentenced to serve six months but was released before completing his sentence on his promise to cooperate with the authorities in further investigation of the bribery scheme.[3]

In the United States, a grand jury investigation was initiated in June 1956. The grand jury was recessed while the government sought the records of Swiss banks into which the petitioners had caused the bribe money to be deposited—records which had been denied the investigating military authorities. The Swiss banks resisted the efforts of the United

[3] Though no double jeopardy obstacle prevents it, the Department of Justice does not normally institute further prosecution for the substantive offense when a conviction has already been obtained on a conspiracy charge, based on the same facts. And this is true even when, as here, the Department of Justice did not control the initial prosecution. But it has always been recognized that this policy of the Department is subject to exceptions. This is such a case. Wilson's sentence in the Commission Court was minimal and he did not serve it all. Moreover, had his punishment ended there, it would have been unjustly disproportionate to Harlow's.

648639—62——2

States government and litigation ensued, including appellate proceedings. Efforts to get the records having failed, the grand jury resumed consideration of the matter in April 1957 and returned the instant indictment.

Following the return of the indictment, the United States government continued its efforts to obtain the Swiss bank records. It was not until March 25, 1959, that the Attorney General was advised by Swiss authorities, through the State Department, that the appellate courts of Switzerland, because of Swiss banking secrecy statutes, would not permit the records to be produced. Promptly thereafter, the government took steps to have petitioners arraigned (on June 30, 1959) and to have a time set for the filing of motions.

On July 30, 1959, petitioners filed numerous motions, including motions for bills of particulars and a motion for the production of documents. On August 25, 1959, the government filed a memorandum in opposition to the motions and on October 29, 1959, it voluntarily filed a bill of particulars. On March 23, 1960, the district court overruled all the motions, except that it ordered the government to produce all papers taken from Wilson in Nürnberg, Germany, on September 8, 1953, by Army investigators and police. The court set the case for trial on June 6, 1960, "emphasiz[ing] that, due to the long pendency of the case and the court's own calendar it is essential that the case be tried when indicated and that no continuance be considered." Thereafter, and up to the date of the trial, petitioners filed several addi-

tional motions for the production of documents.

The trial began on June 6, 1960, as scheduled, although on that morning the petitioners filed a "Not Ready Announcement and Renewal of Laches Motion." During the trial, the court, in commenting on defense protestations about delay, said (R. 845):

> There are many things that caused that. You had a judge to die down here, you had two judges sick, and Judge Rice, of course, had a serious operation, and Judge Thomason has been sick. The other judges that were assigned over here, something happened when they got over here, so it has just been one of those things with regard to the time that has elapsed but anyway we are going to do the best we can about it; so I will overrule the objection.

ARGUMENT

1. The argument that petitioners were not subject to 18 U.S.C. 202 (Pet. 2, 19–22) is refuted by the language and history of the statute. Section 202 applies to "an officer or employee of, or person acting for or in behalf of the United States in any official capacity, under or by virtue of the authority of any department or agency thereof," and petitioners' employment contracts, while negating their status as federal employees, expressly recognizes that EES "is an instrumentality of the United States government and is an organization of the Department of the Army." On the face of it, petitioners would seem to fall within the statute as individuals "acting for or on behalf of the United States."

There is no reason to suppose these words were used in any technically restrictive sense. On the contrary, an examination of the provision as a whole shows it to be broadly inclusive. As noted by the Court of Appeals for the Fourth Circuit in *Wilson* v. *United States,* 230 F. 2d 521, 524, certiorari denied, 351 U.S. 931, the grammar and phraseology alone, the number of broadening words used and the number of disjunctive or alternative persons, actions, or situations referred to indicate that wide coverage was intended.

This construction is supported by extraneous evidence. The Reviser's Notes plainly say that Sections 201 and 202 were changed, in conformity with the apparent legislative intent, to cover ramifications of the executive branch not foreseen at the time of the adoption of the 1909 Criminal Code. Thus, the Note to Section 202 states that the words "or agency thereof" were substituted for previous phrasing "or office of the Government thereof" to "clarify the meaning of this section and further effectuate the apparent intent of Congress to include within its scope all government bodies." And a similar Note to the companion Section 201 (prohibiting offers of bribes), which also applies to Section 202, explains the change in wording as designed to embrace all officers or persons acting on behalf of independent agencies or government-owned or controlled corporations in furtherance of "what appeared unquestionably to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function." The Note under 202 makes a further cross-

reference to Section 6 of the Title, which defines "agency" as including "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." These indications fully justify the Court of Appeals' conclusion that petitioners were "person[s] acting for or on behalf of the United States" within the meaning of this protective legislation.

Moreover, in ruling on their immunity from state taxation this Court has characterized post exchanges as "arms of the Government deemed by it essential for the performance of governmental functions" and "integral parts of the War Department." *Standard Oil Company* v. *Johnson,* 316 U.S. 481, 485. This case has been relied upon by lower courts as decisive of the status of an Army exchange as a federal agency in other areas, *e.g.*, see *Daniels* v. *Chanute A.F.B. Exchange,* 127 F. Supp. 920 (E.D. Ill.) (the Tort Claims Act), and decisions cited therein.[4] With greater rea-

[4] No purpose would be served here by attempted matching of the numerous decisions cited by petitioners as being in conflict with the decision below or as representing purported ambivalence of the government's position as to the status of non-appropriated fund activities (Pet. 19–22). The only such case in this Court, *United States* v. *Krichman*, 256 U.S. 363, was decided in 1921 under the language of Section 201 as it formerly read. It held that a baggage porter in a station of a railroad operated by the United States under the railroad control legislation of World War I was not a person acting for the United States in an official function. Apart from the time of the decision, the difference in the duties performed by petitioners would make that case inapposite.

son, an Army exchange should be included as a federal agency for the purpose of the bribery statute, which has an intentionally broad protective reach.

2. Petitioners' venue objection (Pet. 5, 33–35) is clearly without foundation. Since 18 U.S.C. 3238 provides that the trial of all offenses committed "out of the jurisdiction of any particular State or district" shall be in the district where the offender is found or first brought (see p. 3, *supra*), and the substantive offenses were alleged to have been committed wholly in Germany, petitioners are forced to contend that the territory under the jurisdiction of the United States Court of the Allied High Commission for Germany was a "district" within the meaning of Section 3238 so that the High Commission Court had exclusive jurisdiction to try them for the violations of 18 U.S.C. 202. But there are two insuperable obstacles.

In the first place, the "district" contemplated by Section 3238 means a judicial district as established by Congress, in which there is a regularly organized court having jurisdiction over all offenses made punishable by the laws of the United States. See *Jones* v. *United States*, 137 U.S. 202; see also 28 Op. Atty. Gen. 24. The High Commission Court (comprehensively discussed in *Madsen* v. *Kinsella*, 343 U.S. 341) does not fit that description. It partakes of the nature of a military tribunal created under the executive branch with constitutional authority stemming from the President. Moreover, the Commission Court could not have tried petitioners on the charges presented here. That court, designed to meet the special needs of law enforcement in occupied ter-

ritory, was given jurisdiction over all non-military persons in the area of control with relation to acts transgressing the laws of the Commission or the laws of the territory.[5] Thus, while the court undeniably had jurisdiction to try petitioners for certain offenses, it could not try violations of United States laws, including 18 U.S.C. 202.[6] The offenses charged against petitioners—violations of the laws of the United States—having been committed outside of "any particular State or district", petitioners were properly charged and tried in the state of Texas where they were found. See *United States* v. *Newth*, 149 Fed 302 (D.C.W.D. Wash.).

3. Petitioners' claim that they were denied a speedy trial (Pet. 6-7, 40-42) was properly rejected. The court below unanimously found that there was no "unnecessary" or "unreasonable" delay which might have violated petitioners' rights under the Sixth Amendment or Rule 48(b) of Federal Rules of Criminal Procedure.[7] From the date of the initial investi-

[5] The High Commission Court was given jurisdiction over:

(i) All offenses against the laws and usages of war.

(ii) All offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(iii) All offenses under the laws of the occupied territory, or of any part thereof.

See 12 Fed. Reg. 2190-2191. See also *Madsen* v. *Kinsella*, 343 U.S. 341, 364.

[6] The prior conviction of the petitioner Wilson in the High Commission Court was for a conspiracy to receive bribes in violation of the Laws of the Commission.

[7] The only difference of opinion in the court was as to whether undue delays in filing the formal charge may, under some circumstances, violate the right to a speedy trial.

gation to and after the date of the indictment in 1957, the government was making a bona fide effort to obtain bank records which might have been of crucial importance. Petitioners were promptly arraigned in June 1959, soon after the government was finally apprised that the records would not be available. The first series of petitioners' numerous motions were filed in July 1959 and were answered by the government within a month. The delay in ruling on the motions until March 1960 was probably caused by the unavailability of judges, referred to by the trial judge (*supra,* p. 9). Under these facts, we submit the prosecution was not unduly delayed. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers* v. *Haubert,* 198 U.S. 77, 87.

In any event, the delays were not "purposeful or oppressive." See *Pollard* v. *United States,* 352 U.S. 354, 361. There was no intent to prejudice petitioners' defense. Nor did any real prejudice result from the lapse of time between the offenses and the trial. The facts were essentially simple despite the complicated presentation which petitioners make here. The government's evidence on direct examination (see Statement, *supra,* p. 6) is contained in only 241 pages of the more than one thousand pages of trial transcript (covering for the most part arguments on objections to admissibility of evidence). The essential proof was developed through the testimony of two witnesses, McLane and Emborg, who had paid the bribes pursuant to the conspiratorial arrangement. Petitioners must have known what this testi-

mony would be since they had access to government exhibits, including the transcript of the trial of the petitioner Wilson before the Allied High Commission. The only defense testimony offered was character evidence. Petitioners made no showing of any significant evidence relating to the charges proved which became unavailable because of the delay. Had they been concerned, they might have moved for an early trial. Though reluctantly, the Government was prepared to go to trial sooner. (See R. 37.) Petitioners only raised the issue a month after arraignment, when the trial was imminent. And, even then, they did not ask for a speedy trial, but sought dismissal of the prosecution on the ground of laches. Their complaint came too late. *See United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880.

4. There is no merit to the contention (relevant here only as to petitioner Harlow) that the indictment for conspiracy was too vague and indefinite to enable the defendants to prepare a defense (Pet. 4–5, 24–30). The indictment charged a plan to defraud the United States in three specified particulars: (1) the right to have the exchanges in Europe honestly administered free from collusion between employees and persons seeking to sell merchandise to the agency; (2) the right to have EES contracts awarded in an honest manner free from solicitation of money by employees from vendors as bribes, kickbacks and commissions; and (3) the right to the honest service of its employees, free from corruption, partiality and improper influence (R. 2 *et seq.*). The indictment specifically

alleges the defendants agreed that they would inform McLane, Emborg and others that contracts would be awarded to their firms only if they would split their sales commissions with the defendants; that they would lead McLane, Emborg and the others to believe that a group of EES employees known as "the organization" had control of the award of contracts and that Harlow would retain control of the organization even after his resignation; that they would impede EES from competitive bidding; and that they would cause vendors or their agents to pay money into numbered bank accounts. The count further set out in detail 21 overt acts, reciting verbatim the contents of letters from Harlow to Wilson. Petitioners were thus adequately informed of the charges against which they were called upon to defend. If they were in any doubt that principal witnesses against them would be the vendor-agents McLane and Emborg, that doubt could not have survived the bill of particulars, filed voluntarily by the government. It told the defendants that the persons who had been caused to place money into numbered bank accounts were McLane and Emborg (R. 39–42). Moreover, the bill supplied details of evidence. It set forth the numbers of the bank accounts, the names and locations of the banks, and the dates and amounts of money paid, listing 14 items paid by Emborg and 4 items paid by McLane. It further supplied the names of vendors represented by Emborg and McLane, the type of merchandise sold, and other particulars relating to overt acts.

Nothing in this record supports the assertion that the government withheld significant information from

the defendants (Pet. 28). The government proved its case without the aid of the "other persons [co-conspirators] to the Grand Jury unknown". No other vendors or agents (*i.e.*, other than McLane and Emborg as agents) were produced at trial. The identity of members of the "organization" (the alleged group of corrupt EES employees), was of no concern to petitioners. It was referred to in the indictment only in reciting a representation that the defendants allegedly made to vendors in forcing compliance with their demands. The only alleged members of the "organization" testifying at trial were the government investigators Stewart and Bray who had pretended to infiltrate the group; their testimony as to specific "organization" activities affected only the defendant Addy.

Nor does the record support the accusation that the trial court failed to enforce its orders that the government produce "certain documents" before trial. These "certain documents" are not identified. The government not only complied with the orders of the court, but granted several direct requests of the defendants, furnishing addresses of government witnesses[8] and Department of Defense contract files without being so ordered (R. 85–90).

5. The claim (Pet. 4–5, 30–33) of prejudicial variance because of the alleged proof of two conspiracies (relevant only as to petitioner Harlow) is without

[8] The court found it necessary to state in a letter, addressed to the clerk and counsel, that while the defense was entitled to visit with prospective government witness, the witnesses could not be harassed or compelled to talk with counsel (See R. 101, 247, 1106).

merit. The court below, in reversing the conviction of the co-defendant Addy, held that there was no competent evidence to connect him with the conspiracy charged. Noting however that the investigators Bray and Stewart did testify that, in attempting to work their way into the "organization", they had carried out certain transactions with Addy, the court observed that "[a]t most, the Government established the existence of two separate conspiracies"—one involving Harlow, Wilson and others, the other Addy, Stewart and Bray (Pet. App. 9–10). Assuming the existence of two such conspiracies, the court found no variance affecting substantial rights (Pet. App. 11). Since the proof as to the possible second conspiracy did not implicate petitioners and since it was minor in relation to the overwhelming proof of petitioners' guilt, the court below properly found no prejudice to petitioners.

6. At trial, a great deal of time was consumed in hearing arguments and testimony as to the admissibility of certain letters seized in 1953, pursuant to a search warrant, at the Nürnberg apartment of the petitioner Wilson, arguments which are renewed here (Pet. 3, 22–25). The letters were addressed to Wilson from petitioner Harlow. One advised Wilson that there was "[n]o basic changes in original plans" (R. 695); one instructed him, in the event of "stalling" or "excuse" to "revert to the old method" (R. 698); some gave instructions which Wilson was to follow with respect to the "horseman" and the "fisherman", names by which the

vendors McLane and Emborg were known (R. 688–699; 302; 956).

a. The admissibility of the letters was first raised in a motion to suppress filed by Wilson before trial, attacking the search warrant as not being supported by an affidavit (R. 126).[9] The court indicated that it would grant the motion on that ground (R. 126). But when the government represented that, though the affidavit (recited in the warrant as having been presented) could not be found, the Chief Judge of the High Commission Court would testify as to his basis for issuing the warrant, the trial court agreed to hold the matter in abeyance (R. 137; 424–426).

During the trial, a hearing was held in chambers outside the presence of the jury. Former Judge Turmo of the High Commission Court testified (R. 537–557) that he remembered the occasion of issuance well because Wilson was an acquaintance. He was positive that an affidavit had been filed and thought it had been signed by the prosecutor Canfield. In addition, the allegations of the affidavit were substantiated before him by the oral testimony of a warrant officer, Coleman, who had personally investigated the transactions of Wilson. He had ruled that probable cause existed for the issuance of search and arrest warrants. The Army investigator Coleman testified that he had turned over to Canfield statements taken from McLane and Emborg, and that he and Can-

[9] Below, it was questioned whether standards for the issuance of search warrants are, or need be, the same in the territory of the Allied High Commission for Germany as in the United States. For the purpose of this argument, we assume that they are, without, however, waiving the point.

field had prepared the affidavit for the warrant.[10] He had testified before Judge Turmo, giving the details of his investigation (R. 599–608). Finally, Government counsel apprised the trial court that he had under seal the certificate attesting that the affidavit was a lost document.[11] After the court informed counsel that it was going to overrule the motion to suppress (R. 652–653), defense counsel noted objections to the warrant (R. 655½) including a claim that the letters could not properly be the object of a search (R. 655½-656).

Thereafter on June 10, the letters were introduced at trial during the testimony of the investigator who executed the search warrant (R. 686 *et seq.*)

b. On the following Monday, June 13, at the beginning of the afternoon session of trial, defense counsel approached the bench to ask that the question of illegal search and seizure be reopened. Counsel stated that a talk with the former civilian investigator, Bray (a government witness), had revealed that the peti-

[10] The former prosecutor, Canfield, later testified (R. 880–888) that he had filed the application for the warrant on the basis of information furnished him by McLane and Emborg through oral conversation and in written statements. He had signed the affidavit which related that Wilson had received, in connection with his duty as a member of the Occupational Forces, some $200,000 from McLane and $30,000–35,000 from Emborg through numbered bank accounts in Switzerland. He confirmed that Coleman had testified orally before Judge Turmo in support of the issuance of the warrant.

[11] Government counsel left the room briefly and returned with the certificate. When defense counsel asked to take the certificate for the purpose of checking it against the Rules, government counsel indicated that he would prefer to have a copy made (R. 611–612.)

tioner Wilson's mail had been intercepted and photostated by government agents, and that the information which led to the interviews with the vendors McLane and Emborg, and to the search of Wilson's home, was derived from this illegal mail interception (R. 806–807). The court reserved its ruling while the trial proceeded (R. 808).

During the afternoon cross-examination of the witness McLane, defense counsel asked him if he had ever before seen the Harlow-Wilson letters (R. 852–853). McLane said that he had never seen the letters or any copy of them, although he had been told about one. He thought that Warrant Officer Coleman and civilian investigator Stewart, on the day he had agreed to cooperate with them, had shown him some letters which they said they had intercepted from the mail—some of which were addressed to him. They said that this was how they had obtained information (R. 852–861).

On the same afternoon, June 13, defense counsel produced former civilian investigator Bray as a witness in chambers (R. 889–908). He testified that, during his investigation of EES irregularities he instigated a mail intercept system with the approval of the commanding officer, General Swartz, and with the help of Warrant Officer Coleman and civilian investigator Stewart. He said the system covered all mail delivered to Wilson. As to the Harlow-Wilson letters in evidence, he said he specifically remembered having read a copy of one of them before it was delivered to Wilson, and that he had used it to open the interrogation of the vendor, McLane.

Warrant Officer Coleman testified in chambers that he recalled no interception of any mail of Wilson or of any other defendant,[12] that he never saw a request therefor, and that the civilian Bray could not have ordered it since such a request would have had to go through Army intelligence (R. 918–923). Neither General Swartz nor a colonel serving under him remembered a request for an interception of the mail of Wilson (R. 947, 952–953), although the general vaguely recalled having seen some correspondence dealing with transactions of the defendants which was "purported" to have been intercepted (R. 947, 949).

Coleman's fellow investigator, Warrant Officer Taylor, and their superior, a major, testified that, to their knowledge, no interception of the mail of the defendants was ever authorized or conducted (R. 968, 974). The prosecutor of the High Commission Court, Mr. Canfield, who had made a thorough review of the investigation, had never heard of such an interception (R. 940–941). He testified that in applying for a search warrant in Nürnberg, he used no information that was based upon mail interception (R. 941).

Warrant Officer Coleman further testified in chambers (R. 914–932) that his first lead to the investigation of McLane was a letter (received in evidence, R. 933) sent to the United States Federal Bureau of

[12] Warrant Officer Coleman testified that there was a cover (*i.e.*, a check of the names of senders) put on McLane's mail but that he did not recall confronting McLane with any letters while interviewing him. The officer's superior confirmed the fact of a cover on McLane's mail (R. 968).

Investigation from Holland by one Jules Hoogervorst and thereafter transmitted to his investigative unit. In January 1953, Coleman went to Amsterdam to see Hoogervorst who explained that he could not understand how a United States citizen (McLane) "was making all these money transfers into Swiss banks" when he was employed by Dutch firms. Hoogervorst said he could get documents to prove that McLane was shipping out some $4,000 or $5,000 a month to a Swiss bank. In February 1953, Hoogervorst produced the documents (also introduced into evidence). It was then, in February, that Coleman first discussed a mail cover which was arranged only with respect to McLane's mail. He had never discussed mail interception with anyone prior to the time he received the information from Hoogervorst, and only McLane's mail was intercepted. He did not recall having confronted McLane with mail during his interview.

During argument, the court indicated its tentative view (R. 998–1002) that an unconstitutional interception of the petitioner Wilson's mail had tainted the government's evidence with illegality. The court made clear however that this was not its ruling (R. 989, 1003); and it gave counsel time until the next morning to submit authority for their respective positions (R. 1003, 1013).

On the following day, the court announced in chambers that, after careful consideration of the evidence and authorities in connection with the reopened motion to suppresss, it was denying the motion (R. 1015). The court said that, while the testimony indicated that unconstitutional letter interception

had taken place, it was "equally clear that all evidence presently being introduced was obtained as a direct result of an origin wholly independent of the unlawful interception in question."

The factual issues, as to the existence of an affidavit and its derivation from sources independent of a mail search, were resolved against petitioner by the trier of fact after full consideration. His conclusions, amply supported by the evidence, present no issue for review.

c. The argument that the warrant did not describe the papers to be seized with sufficient particularity does not survive a reading of the warrant itself. Indeed, the warrant recites the objects of the search as "records, documents, and written communications between persons named Harlow, Emborg, McLane, Sokolow, Wilson, Ross, Richards, and Addy and written evidence of Swiss bank deposits, withdrawals and accounts." Nor does the suggestion that the letters were not susceptible of seizure deserve extended discussion. The letters described and seized were used by Harlow and Wilson to carry out the crime and were therefore subject to seizure. See *Harris* v. *United States*, 331 U.S. 145; *Clay* v. *United States*, 246 F. 2d 298 (C.A. 5), certiorari denied, 355 U.S. 863.

7. The contention that hearsay evidence was improperly admitted (Pet. 6–7, 35–40) is clearly without merit.

A witness may properly refresh his recollection from any document that serves to refresh such recol-

lection, regardless of whether the document is admissible. See Wigmore, *Evidence* (3rd ed.) § 758, discussing "present recollection revived". McLane's testimony giving dates and amounts of specific money transfers, refreshed from a bank memorandum (Item 1, Pet. 35–36), was thus clearly proper. Moreover the memorandum itself would have been admissible since McLane testified that he knew that the document correctly recorded the facts at the time it was received by him. See discussion of "past recollection recorded" in Wigmore, *Evidence* (3rd ed.), § 734 *et seq.;* See also McCormick, *Evidence,* pp. 14–18.

The letters written to the petitioner Harlow relative to the conspiracy (Items 2 and 4, Pet. 36) were clearly admissible. The letters were identified by the writers and their proper mailing raised a presumption of receipt by petitioner. Wigmore, *Evidence* (3rd ed.), § 95.

The ledger sheets from Emborg's office prepared under his supervision and his sample copy of the regular request for a transfer of bank funds (Items 3–6, Pet. 36)—made in the regular course of business—were admissible on familiar grounds. See the Federal Business Records Act, 28 U.S.C. 1732. The same is true of the bank confirmations (Item 5, Pet. 36), trustworthy as documents duly accepted as routine in the commercial world, and here established as authentic by the testimony of receipt in the mail in each instance immediately after the transfer was directed. Compare *Zacher* v. *United States,* 227 F. 2d 219 (C.A. 8), certiorari denied, 350 U.S. 993.

Moreover, even if some of this evidence were of questionable admissibility, it was merely cumulative, not only of the direct testimony of the bribe-givers, but of evidence supplied by the recordings, the other documents and the testimony of the investigators.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JULY 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 26 1962

IN THE

Supreme Court of the United States

October Term, 1962

NO. 149

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

John W. Wurzbach, Esquire
19th Floor Amicable Building
Waco, Texas

Attorney for Petitioner,
James W. HARLOW

James Chaiken, Esquire
First National Bank Building
San Antonio, Texas

Attorney for Petitioner,
Charles E. WILSON

IN THE

Supreme Court of the United States

October Term, 1962

NO. 149

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR REHEARING

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners present their Petition for Rehearing of this Court's Order dated October 8, 1962 denying their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and in support thereof respectfully show:

GROUNDS FOR REHEARING

I.

In the absence of Petitioners the Trial Court heard extensive testimony in the form of secondary evidence of "probable cause" for the issuance of a search and seizure warrant, and in connection with the illegal interception by investigators of Petitioner Wilson's mail.[1]

II.

The record does not reflect that there were any objections by counsel or by Petitioners themselves to the taking of this testimony in Petitioners' absence. Indeed, no specification of error was addressed to the United States Court of Appeals for the Fifth Circuit on this point, nor was the question raised in the Petition for Certiorari. The record likewise does not reflect any stipulation or waiver on the part of Petitioners. We are aware of *Parker v. United States*, 184 F. 2d 488 (4th. Cir., 1950); however, in this case, when the defendant returned to the courtroom, he was furnished with a transcript

[1]The record inter alia reflects: "(THE FOLLOWING IN CHAMBERS OUT OF THE HEARING OF THE JURY, BUT WITH COUNSEL PRESENT.) . . . CARL A. TURMO, called as a witness on behalf of plaintiff, being of lawful age, and having previously been duly sworn, testified as follows: . . ." (R. 538-570). Also, "(THE FOLLOWING IN CHAMBERS, WITH COUNSEL PRESENT, BUT OUT OF THE HEARING OF THE JURY) . . . DONALD L. COLEMAN, called as a witness on behalf of the plaintiff, being of lawful age, and having previously been duly sworn, testified as follows: . . ." (R. 599-608). Also, "THE FOLLOWING IN CHAMBERS OUT OF THE HEARING OF THE JURY WITH COUNSEL PRESENT) . . . WILLIAM D. CANFIELD, called as a witness on behalf of plaintiff, being of lawful age and having been previously duly sworn, testified as follows: . . ." (R. 875-888). Also, "SAMUEL E. BRAY, called as a witness on behalf of the defendants, being of lawful age and having previously been duly sworn, testified as follows: . . ." (R. 890-908). The reasonable inference is, of course, that Petitioners were not present, else the record would not specify only the presence of counsel. In any event, the record should affirmatively show the presence of Petitioners. *Lewis v. United States*, 146 U.S. 370, 372, 36 L. Ed. 1011, 1013.

of the testimony of the witnesses who had been examined in his absence, and did not object to their testimony, or examine them further, or take any other action. Aside from this distinction, we believe the *Parker* case conflicts with the First Circuit's holding in *Greenberg v. United States*, 280 F. 2d 472, where it was held error to proceed with testimony in the absence of the defendant, even where apparently defendant's counsel stipulated to a waiver of the defendant's presence. Moreover, this Honorable Court in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, has held that the courts indulge every reasonable presumption against waiver of fundamental constitutional rights.[2]

III.

The Sixth Amendment of the *Constitution of the United States* provides that in a criminal prosecution the accused shall have the right "to be confronted with the witnesses against him."

IV.

Rule 43 of the *Federal Rules of Criminal Procedure*, reads as follows:

> "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

[2]Counsel feel professionally obligated to advise the Court that this question did not even occur to counsel for Petitioners until the receipt by Petitioner Harlow's counsel of a letter dated July 27, 1962, referring to the observation in briefs about extensive testimony being taken in chambers and inquiring if this was error in Petitioner's absence. Upon receipt of this letter Petitioner Harlow's counsel communicated with all of the counsel who had participated in the trial of the case in order to ascertain whether any of them had any independent recollection of events surrounding the sessions in chambers. However, Petitioners do not have the burden of showing prejudice. *Jones v. United States*, 299 F. 2d 661, 662 (10 Cir., 1962).

In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

CONCLUSION

For the foregoing reasons it is respectfully urged that this Petition for Rehearing be granted, and that, upon further consideration, Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOEL W. WESTBROOK, ESQUIRE
12th Floor Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

JAMES GILLESPIE, ESQUIRE
Frost National Bank Building
San Antonio, Texas

Attorney for Petitioner,
CHARLES E. WILSON

CERTIFICATE OF COUNSEL

I, Joel W. Westbrook, counsel for the Petitioner Harlow do hereby certify the foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

JOEL W. WESTBROOK
Counsel for Petitioner Harlow

PROOF OF SERVICE

I, Joel W. Westbrook, attorney for Petitioner Harlow herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day of , 1962, I served copies of the foregoing Petition for Rehearing on the United States by mailing them in duly addressed envelopes, air mail, postage prepaid, to: Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C.; Honorable Beatrice Rosenberg, Attorney, Department of Justice, Washington 25, D. C.; Honorable William Paisley, Attorney, Department of Justice, Washington 25, D. C.; Honorable Ernest Morgan, United States District Attorney for the Western District of Texas, Federal Building, San Antonio, Texas.

JOEL W. WESTBROOK
12th Floor Amicable Building
Waco, Texas